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Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1987

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, GEORGE STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, G. THEODORE MASCOTT, JR., ESTATE OF ROBERT CLEAVES, PATRICIA GOULD ANGLIN, AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART AND MELBA W. NORVELL,

APPELLANTS,

v.

E. GARRETT BEWKES,

APPELLEE.

On Appeal from the Supreme Judicial Court of Massachusetts

JURISDICTIONAL STATEMENT OF APPELLANTS

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I

Question Presented

The question presented in this case is in some sense left over from the October term of this Court, 1900. At oral argument in *Tyler* v. *Judges of the Registration Court*, 179 U.S. 405 (1901), Justice White asked Hosea Knowlton, who was defending the constitutionality of the Massachusetts Land Registration Act,[1] "Mr. Attorney General, what is there in this law to prevent free and unbridled collusion between the Court and the lawyers and petitioners?" Knowlton replied, "Absolutely nothing, Your Honor, except the traditional character of the Bench and Bar of Massachusetts."[2]

As the instant case demonstrates, during the bleak days and nights of the Nantucket winter "the traditional character of the Bench and Bar" does not always respond to the image that Attorney General Knowlton seems to have had in mind. *Tyler* was dismissed for lack of a litigating interest in the appellant and, therefore, this Court never addressed the question of whether a system of land registration relying on character to motivate fair dealing was consistent with the United States Constitution.

Nearly a century later, therefore, appellants must rephrase the question in more antiseptic terms to ask whether Massachusetts may, consistent with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, operate a system of land registration that provides absolute finality to the registration decrees of its Land Court 1) where the true owners of the Locus were given no notice or opportunity to be heard; 2) where the court knew that the petitioner for registration had no right to ownership of the Locus and knew of the

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[1] A system of registration of titles to land, known as the Torrens system, under which title may be conclusively established, after meeting procedural requirements, by the entry of a court decree. Mass. Gen. Laws c. 185.

[2] This exchange is reported in R.R. Powell, Registration of Title to Land in New York, 177, n.32 (1939), reproduced in the Appendix hereto, p. 63("A-63").

lack of notice to the true owners; and 3) where a prior Land Court case[3] exposed the seamy record of collusion, self-dealing and breach of public trust in a notorious scheme by which public officials on Nantucket Island misused the land registration system to help themselves and insiders to land (including the Locus) owned by unknowing and unsuspecting off-islanders.

List of Parties

All parties to this action are individuals or the estates of individuals.[4]

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[3] See *Nantucket* v. *Beinecke*, Land Court Misc. No. 90801 (March 24, 1981) (A-64), in which the Land Court stated that it was "both grieved and aggrieved at the abuse of judicial foreclosure of tax titles and of the trust reposed by it in officers of the Court," but despaired of ever locating the record owners. That the petitioner for registration was not the rightful owner was known to the Land Court prior to entry of the registration decree. The rightful owners were located by appellant Devine and were before the court in this action.

[4] Appellants are Carol Tuttle Christian, Russell Tuttle, George Stetson, George T. Mascott, Mary Seymour, G. Theodore Mascott, Jr., Estate of Robert Cleaves, Patricia Gould Anglin, Agnes Conwell Quinlan, William J. Devine, Zelwyn A. Aarons, Benjamin N. Page, Virginia P. Hart and Melba W. Norvell. A prior plaintiff, not an appellant, was Marion T. Jewell. Prior plaintiffs, now deceased, for whom present parties have been substituted are Ruth Dietrich Tuttle, Dorothy Stetson, Florence Anderson, Richard Bancroft, Edgar D. Gould, Jr., and Lester B. Woodbury. Appellee is E. Garrett Bewkes. Other parties below were defendant Robert F. Mooney and third party defendant Walter Beinecke, Jr.

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APPELLEE.

On Appeal from the Supreme Judicial Court of Massachusetts

JURISDICTIONAL STATEMENT OF APPELLANTS

Opinions Below

The decisions of the Supreme Judicial Court of the Commonwealth of Massachusetts, dated August 17, 1987, and reported *sub nom. Christian, et als.* v. *Mooney, et al.*; *Beinecke*, 400 Mass. 753, 511 N.E.2d 587, petition for rehearing denied, October 1, 1987, and of the Land Court Department of the Trial Court of the Commonwealth of Massachusetts, dated December 10, 1985, are set forth in the Appendix hereto. (A-1, A-14, A-57).

Jurisdiction

This appeal seeks a declaration of the unconstitutionality of Mass. Gen. Laws c. 185, § 45, which, as interpreted and applied by the Supreme Judicial Court of Massachusetts in this case, deprives appellants of their rights to due process of law under the Fourteenth Amendment to the United States Constitution. Jurisdiction of this Court to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts on appeal is conferred, therefore, by 28 U.S.C. § 1257(2).

Appellants hasten to add that the opinion of the Supreme Judicial Court of Massachusetts (hereinafter "SJC") did not by its own terms decide this case contrary to appellants' claims of federal constitutional right. Indeed, the SJC, in a footnote (A-10, n.12), incorrectly denied that due process had been raised as an issue by appellants.[5]

That footnote statement is, to put it most charitably, incorrect. As appellants pointed out in their petition for rehearing before the SJC, denial of due process in *both* the tax lien foreclosure *and* in the registration was claimed by appellants at every stage of the proceeding: in the complaint (A-76); in the opening statement (A-76); in argument during trial (A-76); in Plaintiffs' Request for Findings of Fact (A-78); in Plaintiffs' Trial Brief (A-78) and Post Trial Brief (A-80); in their objections to and motion to amend the findings (A-81); in their

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[5] The SJC apparently thought appellants raised denial of due process solely in the tax lien foreclosure; in fact, at every stage appellants raised the issue of denial of due process both in the tax lien foreclosure and in the registration. The denial of due process in the registration was patent and so recognized by the Land Court in its opinion when it stated, regarding the one year bar for reopening the tax lien foreclosure, that "if it were not for this last ruling, this decision as to [defendants] might be different." (A-47). The focus before the SJC was on this one year bar which it found inapplicable. This focus may have led the SJC astray.

Request for Direct Appellate Review (A-82); and stated as the first issue in their brief on appeal to the SJC (A-84).[6]

Appellants, therefore, have done everything in their power repeatedly to put their Due Process claims before the Massachusetts courts at every stage in these proceedings. These actions clearly are sufficient to preserve appellants' constitutional claims and this Court's jurisdiction under 28 U.S.C. § 1257(2), as this Court recently decided pursuant to the virtually identical provisions of 28 U.S.C. § 1258(2) governing appeals from Puerto Rico. See, *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, 106 S.Ct. 2968, 2975 (1986). Otherwise, the refusal of state courts to address issues of federal constitutional law would divest this court of jurisdiction and appellants of their constitutional rights.

The decision appealed from was entered by the SJC on August 17, 1987. (A-56). Requests for Rehearing were denied on October 1, 1987. (A-57). A Notice of Appeal was filed on December 29, 1987. (A-60).

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[6] Denial of due process was, of course, also claimed in the petition for rehearing. Petitioners stated there:

> The reading given [Mass. Gen. Laws c. 185,] § 45 in the Court's opinion is not merely mistaken. If maintained, the Massachusetts registration system would be constitutionally infirm. As the Court recognizes in its opinion, commenting on the Land Court decision, [Mass. Gen. Laws] c. 60, § 69A cannot cut off objection to the tax lien foreclosure proceeding at issue in this case without raising a "not insignificant due process point." But then the Court attempts to avoid addressing that point by invoking [Mass. Gen. Laws] c. 185, § 45. That, of course, is to use [Mass. Gen. Laws c. 185,] § 45 in precisely the same fashion that [Mass. Gen. Laws c. 60,] § 69A was erroneously used by the Land Court. In short such usage must raise the same "not insignificant due process point" to which this Court alluded. That point simply cannot be avoided. No statute that permits foreclosure of property interests without a meaningful opportunity for notice and hearing can survive.

Constitutional and Statutory Provisions

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mass. Gen. Laws c. 185, § 45, set forth in full in the Appendix hereto, states, in pertinent part:

> If the court, after hearing, finds that the plaintiff has title proper for registration, a judgment of confirmation and registration shall be entered, which shall bind the land and quiet the title thereto. . . .

Statement of the Case

Appellants are the heirs and assigns of the true owners of property on Nantucket, Massachusetts. Appellants were divested of their property—parcels of lots comprising the bulk of Share 10 of the "Smooth Hummocks" section of Nantucket ("Locus"), a parcel of over thirty acres on Nantucket's south shore—through the self-dealing and abuse of process of certain Nantucket Town and County ("Town") officials[7] and officers of the Massachusetts Land Court. The procedures used to accomplish this unconstitutional result now are notorious in the Massachusetts legal community and reveal an arrogant disregard for both private legal righs and the responsibilities of public office. See *infra*, pp. 5-8 and A-64, *ff*.

[7] The Island of Nantucket is both a single Town and a separate County of Massachusetts.

The Locus was assessed for taxes in 1963 for the first time in this century.[8] Rather than assessing appellants' ancestors, the record owners, assessment was made first to "John Doe" and then to one Winchester Veazie, a prior owner who, in the 1870s, had subdivided the Locus and sold virtually all of it. When neither the fictitious Doe nor the dead Veazie paid the taxes, the staggering sum of $.54, the Town took the Locus for non-payment of taxes. Title was then assigned to John J. Gardner II, the Chief Assessor and Registrar of Probate.[9]

After waiting six weks beyond the statutory minimum of two years, Gardner hired Town Counsel, Roy E. Sanguinetti, to bring suit to foreclose all rights of redemption in the Locus.[10] Following local custom, the Land Court honored Sanguinetti's request that Robert F. Mooney be appointed examiner to search the title for the Court. Mooney, who was at the records office every day and wrote a legal history of Nantucket (*"The Nantucket Way"*), based in part on his land records research, managed to miss not only all of Veazie's conveyances of 366 Locus lots, but also his subdivision plan.[11] He therefore concluded in his certificate of examination that Veazie and his grantor, George Easton, also long dead, were the only persons due notice of the proposed foreclosure.

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[8] The Locus had gone off the tax rolls by 1900, as its value then was so low that it literally was not worth the cost of sending out a bill.

[9] In Massachusetts, if taxes on land go unpaid, the property may be taken by the town for nonpayment of taxes by an instrument of taking filed with the registry of deeds. The titles derived from such takings, *i.e.*, tax titles, may be assigned. These titles are subject to the right of the original owner to pay the back taxes and costs and redeem the property. A separate action is necessary to extinguish this right of redemption. See Mass. Gen. Laws c. 60.

[10] This action is governed by Mass. Gen. Laws c. 60. A petition is brought in the Land Court, which then appoints a title examiner to report on the title to determine that the true owner(s) were assessed and that all persons with an ownership interest of record receive notice. If no record owner comes forward to redeem the land, the right of redemption is foreclosed by decree. If a decree enters an owner still may come forward within a year and seek to redeem the property. This one year bar does not apply where there has been a denial of due process. *Sharon* v. *Kafka*, 18 Mass. App. Ct. 541 (1984).

[11] If Mooney had reported the subdivision or any of the conveyances, the assessment and taking would have been void under Massachusetts law.

Sanguinetti reported to the Court that no one knew anything of Veazie or Easton and requested that notice of the foreclosure proceeding therefore be by publication. Leaving nothing to chance, the notices, which were directed only to Veazie, Easton and their unnamed spouses, were placed in the *Nantucket Inquirer and Mirror* in January and February 1967. Not surprisingly, neither party appeared and the equity of redemption in the Locus was foreclosed. Gardner immediately sold the Locus for less than $100 to Sanguinetti,[12] who sold it three weeks later to Walter F. Beinecke, Jr., who traded in Nantucket property. In four years Gardner's initial investment of $15.38 had been parlayed into $16,500.

Beinecke proceeded in 1968 to seek registration of the Locus in the Land Court under Massachusetts' version of the Torrens land registration system.[13] Mooney now represented Beinecke, as he had in many such transactions, and had one Andre Sigourney, his friend and co-author of "*The Nantucket Way*", appointed as title examiner in the registration case.[14]

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[12] Sanguinetti took title as trustee under a Declaration of Trust. Later litigation by parties defrauded with respect to other Nantucket lands established that the declaration was a nullity, surreptitiously added to the Registry records by Sanguinetti, who had "free run" of the Registry, including his own key and the combination to the safe where documents were kept, and who was seen in it on weekends. *Sanguinetti* v. *Nantucket Construction Co.*, Nantucket Probate Court No. 10 (1975), *aff'd* 5 Mass. App. Ct. 227 (1977).

[13] Proceedings for registration of land titles are governed by Mass. Gen. Laws c. 185. A petition is filed in the Land Court, which appoints a title examiner. This report is to determine the ownership of interests in the property, including easements, adverse possession, competing claims, etc. Notice is given to abutting owners, because the boundaries of the property also are determined. The decree of registration settles all claims of ownership in the property, and sets forth all easements in the decree. A certificate of registration then issues. This certificate is the title document, and all subsequent conveyances and interests (mortgages and the like) are listed on it.

[14] Other litigation has been brought against Mooney, Beinecke and Sigourney for similar dealings in the same roles for other properties. Sigourney was inexperienced at title examinations and testified that this may have been his first examination.

Sigourney "piggybacked" upon Mooney's prior examination, relying upon its contents without checking it, and certified that title was in Beinecke. Sigourney, of course, failed to mention appellants' ancestors, the true owners, whose interests appeared in the records.

The registration proceeding was dormant for a number of years. One reason may have been a grand jury investigation and report in 1972 that made the Gardner-Sanguinetti partnership and its dealings in tax titles notorious.[15] Then, in 1979, Beinecke sold the Locus to E. Garrett Bewkes for $150,000, but subject to a condition that registration be completed. Impediments to registration, however, had appeared.

In 1978 the Town sued Beinecke to recover the Locus, claiming that Gardner and Sanguinetti had abused their official positions in acquiring the Locus and that Beinecke was fully aware of their conflict of interest when he acquired it from them.[16] That case ultimately was barred by the applicable statute of limitations. It nevertheless developed further evidence of the pattern of abuse of public trust that had permeated Nantucket under what the then Town Treasurer called her "first come first served" policy of tax title assignments. (A-68). Insiders came first and were served at the expense of both off-island owners and the town fisc.

The Land Court decision in the Conflict of Interest Case (A-64) summarized the history of the abuse of the assessment process and of the asignments of tax titles on Nantucket. The Land Court declared that it was "both grieved and aggrieved at the abuse of judicial foreclosure of tax titles and of the trust reposed by it in officers of the Court." (A-75, n.7).

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[15] The report of the Grand Jury is set forth in the Decision of the Land Court in *Nantucket* v. *Beinecke*, Land Court Misc. No. 90801 (March 24, 1981), ("Conflict of Interest Case") (A-64 at A-71-72).

[16] *Id.*

The Town also moved to reopen the title examination in the registration case, claiming error in the title examinations both there and in the tax foreclosure proceeding. This was supported by an affidavit of one Stephen DeYoung, who had reexamined the title and had reported the many transfers of Veazie's interest in the Locus that had hitherto gone "unnoticed". DeYoung pointed out that this information was readily available to anyone making a reasonable search of the records. (A-4, n.5; A-36).

Instead of acting upon this information, the Land Court reappointed Mooney to update the title examination. Mooney, who had hitherto been counsel for Beinecke in the registration case, filed a supplemental report ignoring the Conflict of Interest Case, the DeYoung affidavit and, of course, Veazie's transfers. Mooney certified that title was in Bewkes, who had been substituted for Beinecke as plaintiff in the registration case. (A-4; A-37). Without opinion, and in the face of the evidence of record revealing the interests of appellants' ancestors, the Land Court proceeded to issue a Decree of Registration to Bewkes on December 9, 1981, purportedly confirming his title against all the world.[17]

This action (Land Court Misc. No. 106538) was commenced the following month, pursuant to Mass. Gen. Laws c. 185, § 45.[18] Plaintiffs sought revocation of the Land Court decree

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[17] Shortly before the decree entered, successor counsel for Bewkes and Beinecke had an ex parte meeting with the judge who issued the decree, where he urged that registration enter.

[18] Appellant Devine located the heirs of Veazie's grantees, who had been thought to be "impossible to ferret out," but too late to prevent the issuance of the Registration decree (Appellees' claims of laches have been rejected at each level). He gave the other appellants the notice which they had been denied for some eighteen years. For his trouble in this and other cases, Mr. Devine became the object of Land Court and Massachusetts Appeals Court vituperation. The Land Court has accused Mr. Devine of "fomenting litigation," has called him a "bounty hunter in troubled titles," and has said that it "abhors" his activities. The Land Court opinion appealed from uses the term "instigate" to describe Mr. Devine's commencement of a suit. The prejudice implicit in these perjorative epithets is revealed in prior cases. The

which purported to register the Locus to Bewkes, imposition of a constructive trust, conveyance of the Locus to plaintiffs and damages from Mooney. Upon motion by Bewkes, the action was transferred from the Superior Court to the Land Court. Bewkes filed a third party complaint against Beinecke. Following fourteen days of trial and post-trial briefs, the Land Court issued Findings, Rulings and Decision ("Decision") (A-14) and entered a Judgment on December 10, 1985 (A-58).

The Land Court upheld the registration decree despite finding that at all times through the tax lien foreclosure upon which the registration was based, plaintiffs' predecessors were record owners of portions of the Locus and that no notice was sent to them, but rather to Winchester Veazie. The Land Court held that, pursuant to Mass. Gen. Laws c. 60, § 69A,[19] the 1967 tax lien foreclosure decree barred any action by plaintiffs to recover their interests in the Locus. Nevertheless the Land Court noted that, but for the bar of Mass. Gen. Laws c. 60, § 69A, "this decision as to Bewkes and in turn Beinecke might be different," (A-47), and made appropriate further findings.

The Land Court found that Mooney's conduct constituted actual or constructive fraud, for which damages would lie. However, some plaintiffs were denied recovery based upon a purported lack of standing.[20] The SJC granted plaintiffs' request for direct appellate review.

Land Court (and subsequently the Appeals Court), in its zeal to discourage claimants such as Mr. Devine, has decided a line of cases contrary to long-standing legal doctrine. Appellant Devine set this forth in footnote 1 of his reply brief, appended hereto, A-85.

[19] This statute, as then in effect, is reproduced in the Appendix. (A-62). Its constitutionality is not in issue here, because it was not relied upon in the SJC opinion. Indeed, the SJC recognized that any such reliance would raise "a not insignificant due process point," citing *Sharon* v. *Kafka*, 18 Mass. App. Ct. 541 (1984) (A-8).

[20] Plaintiffs who claimed interests through ancestors for whom there was no contemporaneous probate proceeding in the place of domicile and place of death were denied recovery, based upon the possible existence of an unprobated will, thereby ignoring the well-settled presumption of intestacy. Plaintiff Devine was denied recovery based upon purported claims of champerty. On appeal the SJC assumed, without deciding, that all plaintiffs had standing (A-2, n. 3) and found that champerty was not a bar (A-5, n. 7).

The SJC's decision on appeal agreed with appellants that to hold, as the Land Court did, that Mass. Gen. Laws c. 60, §69A was a bar to this action would raise a "not insignificant due process point." (A-8). Yet, the SJC then held that appellants' claims were barred by Mass. Gen. Laws c. 185, §45, which permits reopening of a registration decree only where it has been "obtained by fraud." The SJC construed the phrase "obtained by fraud" as requiring a fraud on the Court, not on the dispossessed owners. Because the fraud perpetrated by Mooney was known to the Land Court in the registration case, the Land Court was not defrauded. (A-9-11). In short, the SJC held that where the Land Court knows that fraud exists yet still issues a registration decree based on that fraud, the defrauded landowner has no remedy under Massachusetts law.

Recognizing that the fraud here had resulted in complete lack of notice to record owners at all stages of the proceedings leading to the registration decree, the SJC could hardly ignore the patent lack of due process. It dealt with that defect in a one sentence footnote (A-10, n. 12), indulging in the transparent fiction[21] that plaintiffs-appellants had never raised the issue of due process.

Substantiality of the Question Presented

As was mentioned above, this Court encountered the issue of the constitutional validity of notice pursuant to Massachusetts' version of the Torrens land registration system eighty-six years ago in *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405 (1901).

Tyler hardly presented a compelling case. He was an abutting landowner who had actual notice of the registration proceeding. Indeed, it was this lack of any personal aggrievement that convinced a majority of this Court to dismiss Tyler's appeal for want of the requisite litigating interest. Moreover, Tyler objected to virtually all aspects of the statutory notice

[21] See discussion *supra* at pp. 2-3.

provisions, however reasonable, including notice by publication to unknown interests and service by mail. Small wonder that Chief Justice Holmes for the Massachusetts Supreme Judicial Court found Tyler's claims lacking in merit. *Tyler* v. *Judges of the Court of Registration*, 175 Mass. 71 (1900).

Yet, in upholding the Massachusetts registration scheme, Justice Holmes was troubled. Wise in the ways and the frailties of courthouse lawyers, Holmes saw the possibility for corruption in the registration procedure. Sustaining the scheme Holmes said, 175 Mass. at 78,

> I am free to confess, however, that, with the rest of my brethren, I think the act ought to be amended in the direction of still further precautions to secure actual notice before a decree is entered, and that, if it is not amended, the judges of the court ought to do all that is in their power to satisfy themselves that there has been no failure in this regard before they admit a title to registration.

Justice Loring dissented in an opinion that particularized Holmes' rather generalized statement of concern. Loring agreed with Holmes that the methods of notice provided by the Massachusetts statute could be *made* constitutional. But he was adamant that because the registration decree in the Massachusetts statute purported to foreclose with finality the rights of those who in fact had no notice, that statute was unconstitutional. The inability of a true but absent owner to reopen the proceedings by writ of error or collateral attack was, in Loring's view, not only contrary to all prior practice, but dangerous in the extreme.

> If this rule is dispensed with, no sufficient incentive is left to the plaintiff to name as parties defendant those who have adverse interests; that is to say, those whose interests, if they are brought in, will lead them to do all in their power to defeat the object which the plaintiff seeks to obtain by bringing his suit. The only possible way of

> insuring to those having adverse interests an opportunity to be heard, is to require the plaintiff to name them as defendants under the penalty of their not being barred if not so named. If this penalty is removed, and a defendant is equally bound, whether named or not, there is not only no incentive to name as defendants those who claim an adverse interest, but the law has thereby offered to the plaintiff the greatest temptation not to name an adverse claimant if known, and not to use any diligence whatever to discover whether there are in fact persons who claim an interest adverse to his.

175 Mass. at 91-92.

Nor was this Court sanguine about the Massachusetts procedure. We have already recounted the exchange between Justice White and Attorney General Knowlton set out in Professor Powell's treatise. Perhaps the Court took some comfort from the fact that Judge Davis of the Court of Registration (later the Land Court) was present to hear this exchange with its emphasis on character. Davis was also admonished in a stage whisper from the much-senior Knowlton for all the Court to hear: "By God, boy, you remember that."[22] Davis, a judge of the Land Court for nearly forty years, may well have remembered. And, perhaps, the "traditional character of the Bench and Bar of Massachusetts" was an adequate guarantee of due process in 1900.

Perhaps. It was obviously not enough in Nantucket in the 1960's. But more than that, the SJC has now interpreted the registration statute to confirm the worst fears of Justices Holmes, Loring and White. Now, a court that colludes with lawyers or others, that recognizes, yet countenances, fraud, still may issue a registration decree that is unassailable by the defrauded.

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[22] Powell's full report, based upon the recollections of Judge Davis, is reproduced in the Appendix. (A-63).

Under this construction, if the Land Court protects fraud, then all remedies for that fraud—should the true owners ever discover that their interests have been divested—vanish. The Land Court registration system has become what Gardner and Sanguinetti apparently hoped it might be, a means by which insiders divest outsiders of their property interests, a process that rewards the failure to name and give notice to absent true owners and which imposes no penalty for such a failure.

It remains to be said only that this Court now faces an issue somewhat different from the one that it failed to reach in 1900. The experiment in land registration that Justice Holmes and his colleagues cautiously approved in *Tyler* has operated for nearly a century. As this case demonstrates, however, the fears expressed at that time were well-founded. Local practices, connections and conflicts of interest have the power to destroy the integrity of the judicial process where that process has been effectively shielded from outside review.[23]

The registration system might well have been saved from unconstitutionality had the SJC interpreted Mass. Gen. Laws c. 185, §45 to permit reopening by legitimate claimants whenever the attempt to notify them of their interests has failed to meet basic standards of procedural due process. That such notice failed here is beyond dispute. No notice whatsoever was given, or even attempted, to record owners.

Under this Court's precedents, no notice can hardly be the "reasonably diligent" effort to notify (*Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983)) or the "notice reasonably calculated . . . to apprise" (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)) demanded by the Due Process Clause.

It may be argued, of course, that this Court has never decided what "reasonable diligence" might entail in seeking to notify absent owners whose names and addresses are unknown. From this perspective the question here is a novel

[23] The Conflict of Interest Case demonstrates the widespread abuse.

one of what constitutes "reasonable diligence" in *identifying* interested parties, rather than reasonable diligence in seeking out their addresses or providing notice in a form reasonably calculated to reach them. This way of putting the issue is true so far as it goes, but it misses two essential points. First, no notice was given here to record owners, even by publication. No decision of this Court so much as hints that notice may be dispensed with as to known parties. Second, the underlying fault in the Massachusetts registration scheme as interpreted by the SJC is that it forecloses all opportunity to reopen a proceeding in which notice has fallen short of due process requirements so long as the Land Court knows that notice was defective, even if the defects were part and parcel of a scheme to defraud.

Such a construction reinforces not only the "temptations" of registrants, to which Justice Loring referred, but the temptation to laxity or worse by the Land Court itself. The SJC has thus taken a statute that Justice Holmes thought could barely pass constitutional muster in an era of more relaxed notice requirements for *in rem* actions and has transformed it into a statute that must be deemed to be unconstitutional.

To be sure, the state policy of promoting the finality of judgments and the quieting of titles is due great respect. But that policy cannot override the Constitution. It is well settled that "[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 482 (1982) (citing *McDonald* v. *Mabee*, 243 U.S. 90 (1917); *Haddock* v. *Haddock*, 201 U.S. 562 (1906)). This principle has been applied even where a claimant may have had actual notice that proceedings were under way, so long as the "reasonable notice" required by the Constitution was not provided. *City of New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953).

It also may well be argued that divested owners have their remedy against the Massachusetts compensation fund. (Mass. Gen. Laws c. 185, §§99 *et seq.*) But this is an answer that proves too much. If the existence of the fund cures lack of notice to the true owners, then Massachusetts, in effect, has been given the power to avoid the requirements of the Constitution provided that it pays damages. But no case has ever held that a state can "buy up" constitutional rights by establishing a compensation fund for those who are injured. Indeed, the injury to these appellants would be compensable in an action for damages against the culpable parties whether or not the fund existed. The existence of the fund must be irrelevant to the claim of denial of due process.

This Court should, therefore, declare the Massachusetts statute to violate the Due Process Clause of the Fourteenth Amendment.

Conclusion

This case presents the effectuation of the very danger Justice Loring recognized in his dissent almost 100 years ago in *Tyler*, that a registration system that can foreclose rights without notice is one that invites the dishonest and unscrupulous to abuse and misuse because "no sufficient incentive is left to the plaintiff to name as parties . . . those who have adverse interests." Good "character" is not a sufficient protection against the "temptation not to name an adverse claimant if known, and not to use any diligence whatever to discover whether there are in fact, persons who claim an interest adverse to his." The events giving rise to this case demonstrate that the temptation feared by Justice Loring (particularly in an era of rising land values in the insular atmosphere of Nantucket) has led to the corruption of public officials and the misuse of the court which should protect constitutional rights to property. A constitutional construction of a system purporting to foreclose

property rights by court decree demands zealous protection of due process rights. Where there has been a denial of such rights, there must be redress.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

CAROL TUTTLE CHRISTIAN & OTHERS[1]

v.

ROBERT F. MOONEY & ANOTHER;[2]

WALTER BEINECKE, JR., THIRD-PARTY DEFENDANT.

Suffolk. April 9, 1987.-August 17, 1987.

Present: WILKINS, NOLAN, LYNCH, & O'CONNOR, JJ.

Laches. Fraud. Notice. Taxation, Real estate tax: foreclosure of right of redemption. *Due Process of Law,* Notice. *Land Court,* Vacation of judgment, Registration proceedings. *Real Property,* Foreclosure of tax title; Registered land: review of judgment of registration. *Trust,* Constructive trust.

Civil action commenced in the Superior Court Department on January 27, 1982.

On transfer to the Land Court Department, the case was heard by *George C. Keady, Jr.,* J., sitting under statutory authority.

The Supreme Judicial Court granted a request for direct appellate review.

Jerry L. Mashaw of Connecticut & Jack R. Pirozzolo (*Richard E. Bennett* with them) for William J. Devine.

Bruce A. Isaadore for Agnes Conwell Quinlan & another.

Paul Killeen (*Theodore L. Tillotson* with him) for E. Garrett Bewkes.

Jacob J. Locke (*Robert G. Conley* with him) for Robert F. Mooney.

Kevin G. Murphy for Marion L. Jewell.

WILKINS, J. This case concerns the ownership of particular lots shown on an 1874 plan of land of one Winchester Veazie and located on the south coast of Nantucket in an area described as Share 10 of Smooth Hummocks (Share 10). This case

[1] The other original plaintiffs were: Russell Tuttle, Ruth Dietrich Tuttle, Dorothy Stetson, George T. Mascott, Mary Seymour, Florence Anderson, Robert Cleaves, Jr., Edgar D. Gould, Jr., Agnes Conwell Quinlan, William J. Devine, Zelwyn A. Aarons, Benjamin N. Page, Virginia P. Hart, Melba W. Norvell, and Lester B. Woodbury. Several original plaintiffs have since died and have been replaced by successors in interest.

[2] E. Garrett Bewkes.

also concerns the asserted liability of Robert F. Mooney, who in 1966 acted as title examiner in connection with a Land Court proceeding which purported to foreclose all rights of redemption in Share 10 following a taking for nonpayment of taxes.

In 1967, a Land Court judge, accepting Mooney's opinion as title examiner that record title to the land remained in Winchester Veazie, entered a decree purporting to cut off all rights of redemption. We now know that, among other things, Mooney overlooked two 1874 deeds by Veazie to one D. Morton Fox conveying the lots involved in this action. Each plaintiff, other than Devine, has asserted an interest in particular numbered lots in the subdivision through descent or devise, or both.[3] Devine discovered Mooney's errors by reading certain Land Court records. He located the other plaintiffs, acquired a one-half interest in their claims, and arranged for this proceeding to be brought at his expense.

In 1963, for the first time in at least sixty years, the town assessed taxes against Share 10 in the name of "Winchester Vezie [*sic*] et al," valuing the land at $10. Understandably, the taxes went unpaid, and in February, 1964, the collector of taxes took Share 10 for nonpayment of taxes. In March, 1964, the town's interest was assigned to John J. Gardner, II, for $15.38. Gardner was clerk of the Nantucket board of assessors. About two years later Gardner retained Roy E. Sanguinetti to foreclose the tax title. Sanguinetti was Nantucket's town moderator and town counsel. The petition for foreclosure and the notice of the foreclosure named "Winchester Vezie [*sic*]" as the only interested party. In connection with the tax foreclosure action, the Land Court appointed Mooney as title examiner. Mooney, who was paid a fee of $35 for his services, filed a report, dated June 24, 1966, in which he stated that Veazie was the last known owner of the locus.

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[3] For the purposes of this appeal we shall assume, without deciding, that each plaintiff has established that the person from whom he or she claims his or her interest was a person to whom Fox conveyed particular lots in 1874 or 1875 and that each plaintiff has acquired an interest in particular lots so conveyed.

The trial judge concluded that Mooney was negligent in his title examination. He missed various deeds by Veazie of portions of Share 10 to various persons, including Fox. The pages of the 1862-1875 grantor index for grantors whose names began with the letter "V" became full sometime in 1874 and at the bottom of the last page initially designated for the letter "V," long before 1966, someone had written "see Page 230." If Mooney had noted and pursued that instruction, as the judge concluded he reasonably should have, he should have found reference to the conveyances on which the plaintiffs base their respective claims.[4]

On April 4, 1967, the Land Court entered a final decree in the tax foreclosure case "forever foreclosing and barring all rights of redemption." In May, for less than $100, Gardner conveyed Share 10 to Sanguinetti, as a trustee, and three weeks later Sanguinetti conveyed Share 10 to the defendant Beinecke for $16,500 in an arm's length transaction. Beinecke, following his practice in connection with other Nantucket land, decided to register title to Share 10, and he retained Mooney to handle the matter. On October 16, 1968, Mooney filed a petition to register and confirm title to Share 10. The appointed title examiner made a report in 1969 which commenced with and relied on the 1967 tax title foreclosure proceeding. He gave a report favorable to registration of title in Beinecke. In May, 1976, the title examiner filed a supplemental report which, for purposes of this case, contained no changes but did note irregularities of Sanguinetti as trustee.

While the registration case was pending, certain Nantucket tax taking procedures came under investigation. In July, 1978, Mooney, who was then town prosecutor, withdrew as counsel for Beinecke in the registration proceeding because in June, 1978, the town had brought an action against Beinecke alleging that the conveyance of Share 10 to Beinecke was voidable

[9] Mooney also failed to note two deeds from Veazie of lots in the subdivision noted in subsequent consolidated grantor indexes under the letter "V." Neither of these overlooked deeds is relevant to the plaintiffs' asserted interests. The judge also ruled that Mooney should have found Veazie's subdivision plan of Share 10.

because Gardner and Sanguinetti had violated the conflict of interest statute in their dealing with the land.[5] The town's action came to this court on appeal following allowance of Beinecke's motion to dismiss it. *Nantucket* v. *Beinecke*, 379 Mass. 345 (1979). Following this court's opinion, there was a Land Court trial, and in March, 1981, a determination that the town's action was "time barred." The Land Court judge noted in her decision that "there are questions which now exist in relationship to the title [to Share 10] which will have to be explored ultimately by this Court."

In 1979 Beinecke sold Share 10 to the defendant Bewkes for $150,000, subject to a purchase money mortgage of $145,000. At his option Bewkes could rescind the transaction (except for the original $5,000 payment) if Beinecke were unsuccessful in procuring registration of title to Share 10. In July, 1981, several months after the town lost its Land Court action seeking recovery of Share 10, Bewkes became a substitute petitioner in the registration case. Mooney, on direction from someone in the recorder's office at the Land Court, submitted a second supplemental title examination covering the period from 1967 to July 1, 1981, indicating that title was in Bewkes. In September, 1981, Bewkes paid the balance due to Beinecke and a broker's commission of $15,000. On December 9, 1981, the Land Court issued a decree of registration and confirmation declaring Bewkes to be the owner in fee simple of all of Share 10.[6]

In the meantime, Devine had been at work. In 1980 he discovered in Land Court records DeYoung's affidavit listing the errors in Mooney's 1966 title examination, and commenced the task of identifying people who might be successors in title to the grantees listed in Fox's 1874 and 1875 deeds of portions of Share 10. By early 1981 he had located a number of such

[5] On July 28, 1980, the town also moved to reopen the title examination in Beinecke's registration proceeding. It filed an affidavit, by Stephen DeYoung, a title examiner, in which, according to the trial judge's findings, "all of the material errors relevant to Mooney's title report in the tax foreclosure case were set forth in detail." It appears that the motion was never acted upon.

[6] The trial judge found that before the Land Court judge entered the 1967 decree, he knew of the "deficiencies" in Mooney's 1966 title examination.

people. In exchange for a conveyance of one-half of each person's interest, Devine agreed to underwrite the cost of the litigation if it were unsuccessful. By September, 1981, Devine had agreements with six original plaintiffs and a deed from one of them.

This action was commenced on January 27, 1982, within two months of the entry of the decree in the registration case. The second amended complaint sought a determination that Bewkes held certain lots in Share 10 in a constructive trust for the plaintiffs; that Bewkes be ordered to convey certain numbered lots to particular plaintiffs as tenants in common; that Mooney be ordered to pay damages; and that the registration decree of December 9, 1981, be declared void and without force and effect.

After a trial involving numerous exhibits, the trial judge, sitting in the Land Court by designation, made extensive and thorough findings of fact. He then ruled that Devine could not assert his claim because his agreements with the other plaintiffs were champertous and unenforceable.[7] He ruled certain plaintiffs had established that they were entitled to assert

[7] This ruling was wrong. "That a defendant is being sued under a champertous agreement is not a defense to that action." *Pupecki* v. *James Madison Corp.*, 376 Mass. 212, 220 (1978). There is nothing improper in a person's acquiring an interest as a tenant in common in land of another or in searching for interests that others may have in land and not know of. We need not discuss the question whether the agreements between Devine and other plaintiffs were champertous. Devine argues that the denial of his right to assert an interest in this case impermissibly intruded on his constitutional right of free commercial speech. The characterization of Devine as a "bounty hunter in troubled titles" (*Allen* v. *Batchelder*, 17 Mass. App. Ct. 453, 459 [1984]) does not answer the question of the validity of agreements he may make with discovered heirs and legatees. Also, we think that generally a judge should not undertake on his or her own motion to investigate whether a champertous arrangement has been made. See *Robertson* v. *Plymouth*, 18 Mass. App. Ct. 592, 597 (1984). If there appears to have been an ethical violation, a judge should refer the matter to the Board of Bar Overseers.

At a post-trial hearing counsel acting for all plaintiffs other than Devine and Jewell informed the trial judge that all but one of Devine's coplaintiffs agreed to stand behind his or her agreement with him and not to rely on any possible right to repudiate his or her agreement on the ground of champerty.

rights as successors to one or the other of Fox's grantees, and that other plaintiffs had not. He concluded that the 1963 tax assessment for Share 10 was invalid but that the 1967 decree foreclosing all rights of redemption in Share 10 was unassailable pursuant to G. L. c. 60, § 69A (1984 ed.), which, in the circumstances, purports to bar a proceeding to vacate a foreclosure decree brought more than one year after entry of the final decree. He also appears to have decided that the plaintiffs were barred by laches in their attempt to challenge the 1967 foreclosure decree. He further concluded that the registration of title in Bewkes's name was not obtained by fraud and that under G. L. c. 185, § 45 (1984 ed.), a registration decree could only be vacated on proof of fraud. He ruled that neither Beinecke nor Bewkes committed fraud on the Land Court and that Beinecke, whom Mooney represented for ten years in the registration case, was not chargeable with imputed knowledge of the fraud which Mooney committed on the Land Court in his 1966 title examiner's report. The judge thus ruled that the registration of title in Bewkes should stand and that there was no basis for imposing a constructive trust on Bewkes of any portion of the registered land.

The judge then turned to the question of Mooney's liability to the plaintiffs for fraud. He concluded that the claims against Mooney were not time barred. He ruled that Mooney's 1966 breach of duty to the Land Court was fraud in the sense, not of an intention to defraud, but as "such wilful disregard of the facts as to be tantamount to fraud." The judge held that Mooney was liable in fraud to those plaintiffs who had established their standing, and he assessed damages (totaling $75,000) based on the fair market value of their interests at the time this proceeding was commenced.[8]

Mooney has appealed, as have various plaintiffs, including Devine. We allowed Devine's request for direct appellate review. We need not decide many issues raised by the various appeals. We conclude that (1) the judge erred in his apparent

[8] Because Bewkes prevailed against all plaintiffs, the judge dismissed Bewkes's third-party action against Beinecke.

conclusion that the plaintiffs were barred by laches and (2) there is a difficult question, we need not decide, whether the judge was correct in holding that the plaintiffs' rights are barred by G.L. c. 60, § 69A. We agree with the judge, however, that the registration decree cannot be successfully assailed because such a decree may be reopened only on proof of fraud on the Land Court in obtaining that decree and there was no such fraud. There is no basis for holding that Bewkes holds any of Share 10 in constructive trust for any plaintiff. We further conclude that, whatever Mooney's liability to the plaintiffs might be for negligence, he is not liable to them for fraud in connection with errors in his 1966 title examiner's report.

1. We consider first the question whether the decree of registration of title may be reopened and whether, in any event, Bewkes should be ordered to hold any land in constructive trust for any plaintiff.

The trial judge concluded that the plaintiffs had lost their right to challenge the title registration proceeding because, as we read his opinion, they were guilty of laches and because they or their predecessors had lost their rights because of the 1967 decree in the tax foreclosure proceeding. The judge based his laches ruling on *Lancaster* v. *Foley*, 15 Mass. App. Ct. 967 (1983), suggesting that, as in the *Lancaster* case, the delay in challenging the foreclosure was not the result of excusable neglect. This laches point has no merit. Unlike the parties in interest in the *Lancaster* case (see *id.* at 968), the plaintiffs and their predecessors in interest did not know of the tax taking or of the foreclosure proceeding and would not reasonably have been expected to know of them.

The judge's reliance on G. L. c. 60, § 69A, as a bar to any challenge to the decree foreclosing all rights of redemption is supported by the language of § 69A. Section 69A states that a decree barring all rights of redemption may be vacated only in a proceeding commenced "within one year of the final entry of the decree." If, however, the proceedings, including the

town's failure to assess the record owners and to notify them of the foreclosure proceeding, constituted a denial of due process of law, the purported foreclosure could not be effective. See *Sharon* v. *Kafka*, 18 Mass. App. Ct. 541, 543-544 (1984) (circumstances could raise a due process problem justifying an order vacating a § 69A decree of foreclosure).[9]

The plaintiffs raised this not insignificant due process point before the trial judge, who did not discuss it in his decision. Failure to give notice to a mortgagee of record, by personal service or by mail, of a proceeding to sell the mortgaged property for nonpayment of taxes is a denial of due process of law. *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 799-800 (1983) (*Mennonite*).[10] Here, of course, the interests of the plaintiffs or their predecessors in title living on the date of the 1967 tax foreclosure decree, as the case may be, were not of record. The *Mennonite* opinion does not tell us how far due process of law may require notice to record owners of land (such as the plaintiffs' predecessors in title), who apparently abandoned their interests in the land and whose names are shown on deeds the most recent of which is more than ninety years before the date of a foreclosure decree. Practical considerations, as well as unknown owners' due process rights, have to be relevant in determining how far a municipality must search (whether redemption of the land is foreclosed in the normal course [*Hardy* v. *Jaeckle*, 371 Mass. 573 (1976)] or foreclosed under the procedure applicable to land of low value [see G. L. c. 60, § 79 (1984 ed. & 1985 supp.)]; *Robertson* v. *Plymouth*, 18 Mass. App. Ct. 592 [1984]). In measuring the plaintiffs' due

[9] Failure to assess readily discoverable record owners does not comply with statutory requirements. Cf. *Hardy* v. *Jaeckle*, 371 Mass. 573, 580 (1976) (assessment should be to owner of record of vacant land except where, as here, the task was practically impossible). We shall assume that § 69A undertakes, as far as constitutionally permissible, to excuse such an error.

[10] The due process considerations stated in the *Mennonite* case cast some doubt at least on the reasoning in *Guaranty Mortgage Corp.* v. *Burlington*, 385 Mass. 411, 419 (1982) (concerning the sale of low value land for nonpayment of taxes of which mortgagees of record were not notified).

process rights it may be material that their original predecessors in title abandoned the property and the plaintiffs acquired whatever interests they have as a windfall.

If Bewkes was not entitled to the protection of § 69A, the question then would be whether the tax foreclosure proceedings were invalid because notification requirements were not followed. Here, the record owners were ascertainable, and the town's failure to assess taxes to them, to make a tax taking from them, and to list them in any notice concerning the foreclosure proceeding could well have been "substantial" or "misleading," thus invalidating the tax title. G.L. c. 60, § 37 (1984 ed.). See *Fall River* v. *Conanicut Mills*, 294 Mass. 98, 99-100 (1936).

All these considerations bearing on the validity of the tax foreclosure proceedings and the capacity of § 69A to cut off the plaintiffs' rights present issues which we need not decide in this case. We have discussed them to explain why § 69A does not furnish an easy answer to the question of the plaintiffs' rights against the land. We need not decide these questions because there is another, far clearer reason for concluding that the plaintiffs had no valid interest in the land, once a decree was entered in the registration case.

When "a judgment of confirmation and registration" is entered pursuant to G.L. c. 185, § 45, and becomes final, it is "conclusive upon and against all persons" and "shall not be opened by reason of the absence...of any person affected thereby, nor by any proceeding...for reversing judgments or decrees; subject, however, to the right of any person *deprived of land*, or of any estate or interest therein, *by a judgment* of registration *obtained by fraud* to file a complaint for review within one year after the entry of the judgment, provided no innocent purchaser for value has acquired an interest" (emphasis supplied).[11]

[11] This proceeding was commenced within one year of the date of judgment of registration.

Neither Bewkes nor Beinecke would be innocent purchasers for value, because, assuming for the purposes of our discussion, that the tax taking and the § 69A

There was no evidence that would have supported a ruling that the judgment of registration was "obtained by fraud." The plaintiffs assert that Mooney perpetrated a fraud on the Land Court. The judge ruled that Mooney committed no fraud on the Land Court in connection with the title registration (but had committed fraud in connection with the 1967 tax foreclosure proceeding, a matter we consider later). We need not decide whether, in connection with the registration proceeding, Mooney made any statements of fact concerning title "with such wilful disregard of the facts as to be tantamount to fraud." *State St. Bank & Trust Co.* v. *Beale*, 353 Mass. 103, 104 (1967). See *Kozdras* v. *Land/Vest Properties, Inc.*, 382 Mass. 34, 43 (1980).

There was no fraud on the Land Court because, as the judge found, "the Justice of this Court who authorized the final registration decree knew about the deficiencies attributable to Mooney's work before that Justice entered the registration decree." The trial judge based his finding on the statements about title made in the March 26, 1981, Land Court decision in the conflict of interest case involving title to Share 10 and on the filing in the registration case on July 28, 1980, of a motion to reopen the title examination "supported by an affidavit of one, Stephen DeYoung, a title examiner, in which affidavit all of the material errors relevant to Mooney's title report in the tax foreclosure case were set forth in detail." Thus, whatever misstatements Mooney may have made, they were of no significant effect because the judge who authorized entry of the registration decree was not misled by them.[12] The plain-

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foreclosure proceeding were ineffective and nullities, Bewkes and Beinecke would have had constructive notice of the record title of the plaintiffs' predecessors in title (and would have acquired no valid interest in the land). Section 45, of course, refers to an innocent purchaser who acquires an interest after the entry of judgment, a circumstance not applicable to Beinecke or Bewkes.

[12] The plaintiffs do not challenge on due process grounds the absence of notice to them of the registration proceeding.

tiffs' briefs do not challenge the trial judge's findings that the judge in the registration proceeding knew of Mooney's mistakes. The judge in the registration proceeding may have made an error of law, perhaps in relying on § 69A as a bar to the interests of the plaintiffs and their predecessors, but the registration decree was not obtained by fraud.

We see no basis for holding Bewkes to be a constructive trustee for any of the plaintiffs. He had no knowledge of their claims or of Mooney's alleged fraud. There has been no unjust enrichment. See *Barry* v. *Covich*, 332 Mass. 338, 342 (1955).

2. There remains the question of the plaintiffs' right to judgment against Mooney for fraud. We are not concerned here with claims of malpractice expressed in terms of negligence.[13]

We are doubtful whether Mooney's conduct in 1966 amounted to that kind of misrepresentation that is an essential element of fraud, that is, a misrepresentation of an existing fact made with knowledge of the falsity of the misrepresentation or with reckless disregard of the actual facts. See *Kozdras* v. *Land/Vest Properties, Inc.*, 382 Mass. 34, 42-43 (1980). Certainly Mooney was negligent. The trial judge concluded that Mooney's 1966 breach of duty to the Land Court consti-

[13] The trial judge denied the plaintiffs leave to amend their complaint to allege negligence, and they do not challenge that ruling on appeal. He rejected the plaintiffs' claim that Mooney owed them a fiduciary duty and again the plaintiffs do not argue otherwise on appeal. We thus are not concerned with the question whether a title examiner has immunity of some type from liability for the consequences of his negligence. Nor need we deal with the effect of the State Tort Claims Act (G.L. c. 258 (1984 ed.)), on an examiner's liability, or with whether before the substantial revision of the State Tort Claims Act a title examiner might not have been liable for nonfeasance, as opposed to misfeasance. See *Narine* v. *Powers*, *ante* at 343, 346. Mooney makes no claim here that he is entitled to immunity as to any fraud that may have been found.

We accept as correct the judge's ruling that the statute of limitations does not bar claims which the plaintiffs assert against Mooney for his conduct. They commenced this action within two years of the date when Devine first learned of Mooney's errors, which in the circumstances is the earliest time at which the statute of limitations could have begun to run. See *Hendrickson* v. *Sears*, 365 Mass. 83, 90 (1974).

tuted fraud in the sense of such a wilful disregard of the facts as to amount to fraud. In assessing whether Mooney's disregard was reckless or only negligent, it may be relevant that his omission did not benefit him or any client, unlike the situations in *State St. Bank & Trust Co.* v. *Beale*, 353 Mass. 103 (1967), and *Kozdras* v. *Land/Vest Properties, Inc.*, 382 Mass. 34 (1980). The evidence does not show that Mooney disregarded any fact known to him about Share 10 or its record title that should have put him on notice. He did, however, fail to conduct a proper title search, missing a reference to a page on which crucial deeds out from Veazie were noted (and similar information in grantor's indexes for subsequent periods). It is doubtful that Mooney had notification of possible facts whose existence he failed to pursue so as to be fraud. Even if we assume, however, for the purposes of this case that the level of incompetence shown in Mooney's performance of the 1966 tax examination amounts to reckless disregard of actual facts, the plaintiffs may not recover.

We are dealing with fraud committed in 1966. As we have said, Mooney did not commit fraud on the Land Court in connection with the title registration proceeding. The judge's discussion of Mooney's tort liability in fraud is based on an unsupported assumption that the plaintiffs may recover for fraud committed not on them but on the Land Court in connection with the 1966-1967 proceeding to foreclose all rights of redemption.[14] Neither § 69A nor any other statute grants a person aggrieved by a judgment obtained by fraud on the Land Court in a tax foreclosure proceeding the right to seek damages on the basis of that fraud. We have seen that, in matters involving registration of land (G.L. c. 185, § 45), the Legislature has acknowledged the right of an aggrieved person to pursue a

[14] Surely no plaintiff or plaintiffs' predecessors in title, having an interest in the land at the time of the foreclosure proceeding, ever relied on any representation Mooney made. Because they and their predecessors in title never relied on anything Mooney represented, he cannot be held liable to them for traditional common law fraud. See *Graphic Arts Finishers, Inc.* v. *Boston Redevelopment Auth.*, 357 Mass. 40, 44 (1970).

private remedy for fraud on the Land Court in procuring a decree. See *State St. Bank & Trust Co.* v. *Beale*, 353 Mass. 103 (1967). We grant that the Land Court could "entertain an independent action . . . to set aside a judgment for fraud upon the court" (Mass. R. Civ. P. 60[b], 365 Mass. 828 [1974]), at least if it were brought within one year (G.L. c. 185, § 45). We decline, however, to impose common law liability for fraud on a title examiner who did not intentionally defraud the Land Court, but who recklessly disregarded information of record, where the persons seeking damages (and their predecessors) never relied on any fraudulent misrepresentation.

The plaintiffs make a general claim of fraud by Mooney, but they do not focus on errors in his 1966 title examination as the sole basis for liability. They cite no case in which a defendant who did not and could not benefit from his fraud on a court has been held liable for money damages to persons whose interests were harmed by the defendant's reckless disregard of facts constituting the fraud.[13]

3. Those portions of the judgment ordering recovery by certain plaintiffs against Mooney are vacated. A judgment shall be entered reflecting judgment for Mooney against each plaintiff, and indicating, as before, that judgment should be entered in favor of Bewkes against all plaintiffs, and in favor of Beinecke as third-party defendant.

So ordered.

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[13] We note that the plaintiffs have argued, and we have assumed for the purposes of this case, that the foreclosure proceeding was a nullity and the 1967 decree did not foreclose any of their rights. If that is so, the plaintiffs were not harmed by any misrepresentations Mooney made to the Land Court in 1966. Their title would have been unaffected by the foreclosure decree, and, if they had joined the registration proceeding seasonably, they could have preserved their rights.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. LAND COURT
No. 106538

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, RUTH DIETRICH TUTTLE, DOROTHY STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, FLORENCE ANDERSON, RICHARD BANCROFT, PATRICIA G. ANGLIN, AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART, MELBA W. NORVELL, AND MARION L. JEWELL,

PLAINTIFFS

v.

ROBERT F. MOONEY,

DEFENDANT

v.

E. GARRETT BEWKES,

DEFENDANT & THIRD-PARTY PLAINTIFF

v.

WALTER BEINECKE, JR.,

THIRD-PARTY DEFENDANT

FINDINGS, RULINGS AND DECISION

This action comes before this Court on a Second Amended Complaint (hereinafter referred to as the complaint) and a Third-Party Complaint. The complaint is brought by groups of alleged heirs of four particular ancestors, namely Andre Woodbury, Russell H. Conwell, Ellen F. Gould, and Rufus A. Johnson. These plaintiffs are joined by a co-plaintiff, one William J. Devine, who is a co-venturer with them having investigated the subject title to real estate and having instigated these proceedings. The defendants are: first, Attorney

Robert F. Mooney who examined the subject title by appointment from this Court for a relevant tax title foreclosure and for a relevant land registration run-down supplementary to the principal examination, and second, E. Garrett Bewkes, the alleged present title holder of locus. The third-party defendant is Walter Beinecke, Jr. who is Mr. Bewkes' immediate predecessor in title and whom that defendant acting as a third-party plaintiff moved against in the event Mr. Bewkes should be held liable in any way and suffer a loss in this suit.

The subject matter of this suit is a parcel of land on the south side of the island of Nantucket in this Commonwealth which land has frontage on the Atlantic Ocean.[1] Historically locus is known as Smooth Hummocks, Share 10. Originally it was said to contain about 47 acres. Whether that calculation was motivated by undue enthusiasm or whether erosion has taken its toll, by the mid-sixties the dimension was reduced to 30 acres.

The plaintiffs herein seek three remedies. The complaint asserts four counts which contain the legal theories. Separate from these there are nine numbered paragraphs of relief sought. It is by combining all these that I determine the three requested remedies. First plaintiffs request a review of a land registration and confirmation decree of this Court and a declaration that that decree is void and without force and effect.[2] Secondly plaintiffs request that the Court pursuant to M.G.L. Chapter 231 enter a declaration that the defendant Bewkes holds title to certain lots in a constructive trust for the benefit of the plaintiffs.[3] In conjunction with this second prayer, the plaintiffs plead that certain lots (see FN 3) be conveyed by Bewkes to certain plaintiffs. Thirdly the plaintiffs seek monetary damages from the defendant Mooney under

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[1] Actually none of that part of locus claimed by the plaintiffs is contiguous to the sea. The master parcel has such frontage.

[2] Land Court Reg. Case #35851.

[3] Certain plaintiffs claim certain lots and not other subject lots depending on their ancestry.

two theories, i.e., fraud and breach of fiduciary duty. The complaint makes no explicit claim for damages from Mooney based on negligence.[4] All these claims and theories will be fleshed out as this decision progresses.

To paraphrase a radio program of my youth travel back with me to the days of yesteryear where not only was the West young, but the island of Nantucket was less cluttered and was in the swale between the prosperity of whaling and the prosperity generated by the multitudinous visits and investments of the off-islanders. The year is 1874. By deed duly recorded[5] on May 23rd of that year George Easton using a running description conveyed Shares 8 and 10 of Smooth Hummocks to Winchester Veazie. The deed is in Book 63 Page 92. Veazie subdivided Share 10 into 380 lots and recorded the plan in Plan Book 1 page 94. Subsequently Mr. Veazie by deeds duly recorded made the following conveyances.

Lot Numbers	*Grantee*	*Record Date*	*Book*	*Page*
1 to 250 incl.	D. Morton Fox	Aug. 18, 1874	63	230
251	Daniel S. Adams[6]	Aug. 29, 1874	63	247
253	Mary E. Tilton[6]	Oct. 10, 1874	63	282
254	Frank Hayes[7]	Mar. 23, 1891	75	51
260	Jeremiah Tinkham[6]	Feb. 13, 1879	65	289
265	George L. Brewster[6]	Nov. 6, 1874	63	298
270 to 380 incl.	D. Morton Fox	Nov. 19, 1874	63	309

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[4] During trial, counsel for the plaintiffs sought to amend the complaint to cure the deficiency. I denied the motion on the grounds that Mooney was unfairly harmed by such an addition late in the trial. Counsel then asserted that the claim was implicit. I disagree.

[5] All reference to recordation means in the Nantucket County Registry of Deeds.

[6] No conveyance affecting Smooth Hummocks, Share 10, from this grantee is recorded in the Nantucket Registry of Deeds, and there is no estate probated in its Registry of Probate.

[7] The Collector of Taxes for Nantucket Town sold to the Town Lot 254 for the nonpayment of taxes by deed dated February 10, 1899 and duly recorded in Book 81, Page 497. No further instrument of record to transfer title except as the same may be affected by the Gardner Transfer to Sanguinetti Trustee hereafter described.

Thus on the records of the Nantucket Registry of Deeds title to Lots 252, 255 to 259 incl., 261 to 264 incl. and 266 to 269 incl. (14 lots in all) remained in Winchester Veazie. All of the conveyances from Mr. Veazie as shown in the schedule above are duly shown in the grantor indices under the grantor name of Veazie. The "V" index in the consolidations for the years 1862 to 1875, 1875 to 1885, and 1885 to 1892 are not precisely alphabetical except for the first letter, the "V". The recording date seems to control. Thus in one sequence Veazie follows Vincent. It should also be noted that in the first consolidation mentioned above (1862 to 1875) after two pages of "V" documents which pages end on page 218, since page 219 must be given over to another letter, at the bottom of page 218 is written "see Page 230." I find that this direction was affixed long before 1966. As a matter of fact on page 230 "V" is continued with twenty-nine instruments noted. It is also true that while on pages 217 and 218 there are no conveyances from Winchester Veazie involving Share 10 of Smooth Hummocks, on page 230 the four deeds dated in 1874 and described above are appropriately listed. In the next consolidation the "V" instruments begin on page 219 and then with a similar notation or direction go to page 218. There the Tinkham transfer is listed. The Hayes transfer is listed in the 1885 to 1892 consolidation. It is also to be noted that in the first consolidation there are no notations giving clues to land locations except for the "V" instruments. This is also true of the second consolidation except that "V" has such notations for about 50% of its instruments and the other letters have a few—very few—such notations. The last consolidation has many such notations for "V" and for almost all other letters. The descriptive notations referred to by me are of unknown authorship and their reliability is suspect. It is my finding that absent such information and even with such information good title examination practice requires an investigation or review of each instrument.

The Court now turns its attention to the lots from the aforesaid schedule which passed to D. Morton Fox. That gentleman by deeds duly recorded made the following conveyances.

Lot Numbers	*Grantee*	*Record Date*	*Book*	*Page*
1 to 10 incl.	Bray Wilkins	Feb. 27, 1875	63	385
11 to 125 incl.	Amos D. Gould	Oct. 2, 1874	63	274
126 to 250 incl.	Ellen F. Gould	Sept. 2, 1874	63	250
270 to 324 incl.	Andre Woodbury[8]	Nov. 19, 1874	63	310
325 to 354 incl.	William W. Sampson[6]	Nov. 28, 1874	63	317
355 to 370 incl. and 379	Russell A. Conwell	Nov. 2, 1875	64	22
371 to 377 incl.	John Perkins[6]	April 15, 1886	70	458
379[9] & 380[6]	Benjamin S. Boynton	Jan. 22, 1876	64	79

D. Morton Fox remains the record owner of Lot 378 in that no deed from him of that lot is recorded in said Registry of Deeds. Ellen F. Gould conveyed lots 149 and 150 to P. L. Clark by deed duly recorded on January 12, 1875 on Book 63 Page 358.[6] Bray Wilkins conveyed lots 1 to 10 inclusive to Mary E. Patrick by deed duly recorded on February 27, 1875 in Book 63 Page 386.[6] Without tracing the title in detail Ellen F. Gould conveyed lots 126 to 130 inclusive to Thomas Wells in 1875 and that record title in 1877 came to rest in Gustavus A. Miller, Jr.[6] Similarly Andre Woodbury divested himself of lots 307 and 308 in 1876 with that record title ending as follows: lot 308 in Alvin Rodliff in the same year,[6] and lot 307 in Walter D. Eaton.[6]

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[6] No conveyance affecting Smooth Hummocks, Share 10, from this grantee is recorded in the Nantucket Registry of Deeds, and there is no estate probated in its Registry of Probate.

[8] The deed fails to give a first name to the grantee, but on the basis of the evidence this Court finds that Andre Woodbury was intended in all three usual and appropriate places in the deed.

[9] Because Fox's deed to Conwell was recorded before the deed to Boynton, Lot 379 passes to Conwell and not to Boynton.

More importantly for our purposes Andre Woodbury conveyed lots 270, 271, 274 to 300 incl. and 306 to Rufus A. Johnson by deed duly recorded on August 7, 1875 in Book 63 Page 530. Johnson did not retain lots 280 to 291 incl. but deeded the same to John Nickerson by instrument duly recorded on April 3, 1875 in Book 63 Page 412.[6] Our Mr. Johnson also lightened his load by ridding himself of lots 270, 271, 274 to 279 incl., 292 and 293. This title eventually came to rest in Sophia Hunter.[6] This lady did encumber two of the enumerated lots but such is immaterial to the present case.

Amos D. Gould apparently did not desire to be a land owner on Nantucket. He conveyed lots 11 to 125 incl. to Francis C. Hinckley by deed recorded on March 11, 1875 in Book 63 Page 398. To follow the record titles to those lots is not only detailed and complicated but immaterial to the claims of these plaintiffs.

It is well then to sum up the record titles alleged by plaintiffs to be in their respective ancestors.[10] They are as follows:

Name	*Lot Numbers*
Ellen F. Gould	131 to 148 incl. 151 to 250 incl.
Andre Woodbury	272, 273 301 to 305 incl. 309 to 324 incl.
Rufus A. Johnson	294 to 300 incl. 306
Russell A. Conwell	35 to 370 incl. 379

I now turn to the descent of the above interests either by inheritance or devise. The following lines are based upon evidence produced during trial but where proof has failed I do so note.

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[6] No conveyance affecting Smooth Hummocks, Share 10, from this grantee is recorded in the Nantucket Registry of Deeds, and there is no estate probated in its Registry of Probate.

[10] The Court notes the exception of Mr. Devine.

Ella or Ellen F. Gould named above was the wife of Amos D. Gould. Mrs. Gould died on February 16, 1913 in Providence, Rhode Island, survived by Amos and as the mother of Edgar D. Gould, Edith M. Burroughs, nee Gould, Josephine L. Cleaves, nee Gould, Mabel M. Stellwagon, nee Gould, and Florence G. Anderson, nee Gould. Amos D. Gould died April 17, 1920 in Bronxville, New York without having remarried and the father of the same five children. The plaintiffs proved that there was no probate of the will or estate of Ella F. Gould in Providence and none of Amos D. Gould in Westchester County, New York.[11] However there is not sufficient evidence to show either decedent's residential contact in Providence and Bronxville respectively. In fact Ella's death certificate leads this Court to determine her contact with Providence was institutional only. Amos' contact with Bronxville may be greater but proof of legal domicile is lacking. Thus this Court is not satisfied that the plaintiffs have borne their burden of proving by a preponderance of the evidence that Ella Gould's interest in the last recited lots attributed to her passed by intestacy to her husband and their five children and that such interest passing to Amos D. Gould then passed by intestacy to his five children.[12]

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[11] Bronxville is located in Westchester County. Rhode Island probates by cities, New York by counties.

[12] Mary Seymour who in her own right will enter this decision further on and who is a granddaughter of said Amos D. and Ella F. Gould filed petitions for administration in the Probate Court for the County of Nantucket on September 10, 1982 well after this case was commenced for the estates of both grandparents. In the listing of heirs an unusual group has been assembled. Eight are listed as deceased, one is listed as a "grandson-in-law" (a relationship that seems to have escaped the intestacy statutes of Massachusetts. M.G.L. Chapter 190, Section 3) and in Ella's estate no spouse is listed although Amos was alive at her death. A decree was granted on November 11, 1982 appointing Michelle Carvotta administratrix of each estate. Ms. Carvotta was attorney for the plaintiff Devine at or around late 1982. While these administrations are apparently not barred by M.G.L. Chapter 193, Section 5 the petitioner's deposition (pp. 18, 19) indicates she had a minimal, second-hand knowledge of her grandparents. She would not be in any position to say that they died with or without a will or that probate proceedings had not been commenced in another court at a time much closer to their respective deaths.

On the basis of the evidence presented the Court finds the following about the Gould line. Edgar D. Gould who was born on January 8, 1875 married Lalia Raymond. One child was born of that marriage on January 28, 1923. He was Edgar D. Gould, Jr. The senior Edgar died January 28, 1945 in Florida. His will was probated and left the residue of his estate[13] to his widow, Lalia. In turn Mrs. Gould died in Florida on February 22, 1972. There was an administration of her estate showing no will and her son Edgar, Jr. to be her sole heir. This noble died on March 2, 1983 in Miami with his intestate administration showing his heirs to be his widow Mildred B. Gould, and his children Patricia G. Anglin, Deborah G. Tucker, Edgar D. Gould III and William B. Gould. Mrs. Anglin was appointed administratrix of her father's estate. She as such is a substituted plaintiff herein. We do not have the widow or other three children as parties to this suit. *Henshaw* v. *Blood*, 1 Mass. 35 (1808); *Hodgkinson* v. *Hodgkinson*, 281 Mass. 463 (1933). Any interest in Nantucket land would pass according to Massachusetts law. *U.S.* v. *Crosby*, 11 U.S. 115 (1812). Thus the widow would be entitled to a half interest. M.G.L. Chapter 190, Section 1(2) and the children would split the remaining half.

Next we turn to Edith M. (Gould) Burroughs who was born January 24, 1877. She had two marriages but died a widow in Florida on August 2, 1970. She left a will and her estate was probated in Broward County. Her will has the effect of creating about thirty-six residuary legatees or devisees.[14] The interests of each depend on the ratios created between monetary legacies. The persons familiar to or recognized by this Court are Edgar D. Gould, Jr., Patricia Chancey Gould who is Patricia G. Anglin mentioned above, Deborah Gould who appears to be Mrs. Tucker above, Edgar D. Gould III,

[13] Any interest in locus would pass by the residuary clause.

[14] There is a requirement that the taker survive the testatrix and at least one gift is joint.

William Gould, Lalia R. Gould and Anna Aarons who will be described later. As stated above we certainly do not have Mrs. Anglin, Mrs. Tucker, Mr. Gould III and William Gould individually as plaintiffs. I will not retrace the interests of Edgar Jr. and Lalia. Anna Aarons did not survive Mrs. Burroughs as will appear hereafter and thus would have taken nothing from her. Again, suffice it to say, that the plaintiffs taking from Ellen Gould and Mrs. Burroughs have not borne their burden.

The next child born to Amos and Ellen Gould was Josephine L. Gould who entered our material world on June 25, 1879. She married Robert Cleaves and bore two children namely Robert Cleaves Jr. and Dorothy Cleaves. Josephine died a resident of Brookline, Massachusetts on June 20, 1952. Her husband and two children survived her. There is no probate of her estate in Norfolk County. At the time of her death if she died intestate Mrs. Cleave's property would have passed one-third to her husband and two-thirds to be divided equally between her son, Robert Cleaves, Jr. and her daughter who became Dorothy Stetson. The plaintiffs have failed to prove that Josephine L. Cleaves died without a will, but they have proven that the appropriate records indicate no will. This Court will rely on the records.

In turn Robert Cleaves Sr. who remained an unremarried widower to his death on July 18, 1969 in Boston did not leave a will. Voluntary administration, M.G.L. Chapter 195, Section 16, was secured by Robert Cleaves Jr. in Suffolk County. The decedent's two children were his heirs. Robert Cleaves Jr. died in Boston on May 14, 1982 and Dorothy Stetson died in Bedford, Massachusetts on February 22, 1984. Cleaves Jr. was a widower and unmarried at death. His will which has been probated in Suffolk County left all his property to his daughter Susan Cleaves. Richard Bancroft was appointed executor of his estate and has been substituted as a party plaintiff in place of Robert Cleaves Jr. but Susan Cleaves is not a party to this action.

When Dorothy Stetson died, she was possessed of a will which was admitted to probate in Norfolk County on May 3, 1984. Her husband Richard P. Stetson did not survive her so her two sons were her sole legatees and devisees. Their names are George A. Stetson 2nd and Richard P. Stetson, Jr. The former was appointed administrator c.t.a., and he was substituted in that capacity as a party plaintiff in this action. He is not named individually nor is his brother.

The fourth child of the eldest Gould's was Mabel who was born August 15, 1881 and became Mabel M. Stellwagon. She had one child Anna S. Aarons, nee Stellwagon who was born in 1919 and was killed on April 29, 1969 at Walnut Creek, California leaving a husband Zelwyn Alexander Aarons, and two children Victoria Aarons born December 22, 1952 and John David Aarons born September 3, 1958. Mrs. Aarons' property passed by the will which she left and which was offered for probate to Crocker National Bank as trustee for the benefit of her husband while he lived and then to her children. Her husband, Dr. Aarons was named executor of her will. He petitioned for appointment. There is no proof that the will was ever allowed, or that the bank ever qualified as trustee. There is also mention of two codicils to the will in the petition for probate. This Court has never seen them. However based on the evidence before me, Dr. Aarons is not in any way an appropriate plaintiff. He has no claim to any real estate title which might be derivative through Anna Aarons.

The baby of the original Gould union was Florence Gould[15] who was born January 15, 1883. She subsequently married Charles Anderson and they produced three children, to wit: Florence Anderson, Edith Mascott, nee Anderson, and Mary Seymour, nee Anderson. Florence Anderson, the mother, died in Brooklyn, New York on April 26, 1961 survived by her husband, Dr. Charles Anderson. Her will was probated in Kings

[15] She seems sometimes to be called Florence E. Gould and E. Florence Gould.

County (Brooklyn). It left all the testatrix' property after four monetary bequests to her spouse. In turn the latter gentleman proceeded to eternity on January 22, 1971. His will, duly admitted to probate, left all his property to his three named daughters, the ladies recited above. Mary Seymour and Florence Anderson, the daughter, are plaintiffs in this action. Edith Anderson became Edith Mascott by marrying George T. Mascott in the late 30's. She bore two sons, namely, George T. Mascott, Jr. and Charles G. Mascott. She died in Vermont on June 24, 1981 but was actually a resident of St. Petersburg, Florida. She left a will but no probate has ever been brought since all her known properties were held jointly with her husband. However the plaintiffs have again failed in their burden of proof. This court is left uninformed concerning the provisions of her testate directions. Her spouse, George Mascott, is a plaintiff in this suit. Whether he succeeds to any or all of his wife's alleged rights in the locus is left to conjecture.

Here for the time being we leave the descendants of Ella F. Gould. I turn my attention next to Andre Woodbury and his progeny. This ancestor was born in 1845, married one Matilda F. Woodbury and died testate on February 10, 1914, a resident of Saugus, Massachusetts. His widow took a life estate in all his properties. The remaindermen were his sons Charles W., Chester P. and Clarence G. Woodbury. The will was admitted to probate in Essex County on March 30, 1914. In turn Matilda F. Woodbury died in Saugus on November 2, 1929 thus terminating the life estate. Matilda was preceded to the grave by her son, Charles who died July 15, 1918 after a motorcycle accident. Since he had a vested remainder in his father's estate his one-third interest passes with all the rest of his property.

Administration of the estate of Charles W. Woodbury was sought in Essex County by his widow. This petition was allowed July 22, 1918. The petition shows his spouse, Agnes H. Woodbury and his minor son, Lester B. Woodbury as his only

heirs. They would have split the decedents' estate as follows: one-third for the widow, two thirds for the son. The next material event in our saga is the death of Agnes in Springfield, Massachusetts on May 18, 1961. She left all her estate by will to her son, Lester B. Woodbury. The will was allowed August 15, 1961. Thus the entire interest of Charles W. Woodbury vested in his son, Lester.

On August 27, 1983 that son died testate. While he was survived by a widow, his second wife, Anna R. Woodbury, she was left nothing by him. The will was admitted to probate on February 7, 1984. There has been no proof by the plaintiffs negating the possibility of a waiver of the will by Anna R. Woodbury, M.G.L. Chapter 191, Section 15. While this is a possibility, it is my holding that the burden of proving such waiver is the defendants'. Therefore this Court is governed by the explicit provisions of Lester's will. He left all his property to his children: Inez M. Teeling, Marion L. Jewell and Lester B. Woodbury, Jr. Mrs. Jewell was appointed executrix. She has been substituted in her fiduciary capacity as a party plaintiff (allowed May 31, 1984). However again we have none of the devisees of Lester B. Woodbury, Sr. as plaintiffs in this action.

We now return to the other children of Andre Woodbury. Clarence G. Woodbury who had been born in 1876 died in Whittier, California, the place of his residence, on January 25, 1963. He was an unremarried widower. The residue of his estate went by will equally to his daughter, Margaret Melba Norvel who is one of the plaintiffs herein and to his son, Norman Earl Woodbury who is not a party to these proceedings.

The third son was Chester P. Woodbury. He was born May 26, 1874. Except for a passing reference to him in the deposition of Melba Norvell, this case provides little reference to him. I find that he was married to one Mabel Peterson, that he died in 1933 and that he had no issue. His heirs or devisees are not parties to this suit.

Again we put aside one group in the cast of characters of this case, and we take up Rufus A. Johnson and his family tree. Mr. Johnson was married to Ellen M. Johnson, nee Newhall, on October 15, 1854. They produced four children, namely, Benjamin N. who was born in 1856, Ellen M., who was born in 1862, Louise D. who was born in 1879 and Arthur who was born in 1880. Rufus died on the Ides of March in 1897 a resident of Saugus, Massachusetts leaving his aforementioned wife and children. There is no probate of his estate in Essex County. However here again the plaintiffs have failed to bear their probative burden. In 1897 a widow would only have been entitled to a dower share in the real estate of which her husband died seised. Dower consisted of a life estate. R.L. Chapter 140, Section 3 which gave the widow a fractional freehold estate was not passed until 1900. In the subject estate there could have been a will. While it appears likely any will probate or intestate administration would have been pursued in Essex County, I cannot assume the same.

On February 24, 1926 Ellen M. Johnson, the widow of Rufus, died in Saugus. Her estate was probated on May 17, 1926. There was no will. She was unmarried and survived by her children, Benjamin N, Arthur F, Nellie (Ellen) J, now O'Connor and Louise J, now Page. The only evidence we have from the plaintiffs of those children thereafter indicates that Benjamin Johnson married and had four children, that Arthur Johnson did not marry and that Nellie married and had two children. There has not been adequate proof by the plaintiffs that Virginia Hart and Benjamin Page soon to be introduced in detail to this memorandum acquired the interests of any of these siblings of Louise, the other child of Rufus. Thus I find that the interests of Benjamin N. Johnson, Arthur Johnson and Nellie Johnson O'Connor are not represented in this suit.

As for Louise Johnson she became the wife of Henry Clay Page. She bore three children, to wit: Barbara, Virginia and Benjamin. Louise J. Page died September 29, 1957, a resident

of Kansas City, Missouri. There is no probate of her estate in Kansas City or in Independence, Missouri. Barbara Page died without ever marrying, but we do not know if she predeceased Louise. While both Virginia Hart, nee Page, and Benjamin Page are plaintiffs in this suit the plaintiffs have again failed to prove by a preponderance of the evidence who took her estate, whether it was testate or intestate and whether Barbara took an interest.

The final family tree is that of Russell H. Conwell. A son of western Massachusetts he carved out a distinguished career. Soldier, attorney, lecturer and minister he went on to found Temple University and became its president. Our interest however lies with drier facts and dates. Mr. Conwell was born in 1845 and died in Philadelphia on December 6, 1925. In the interim he had two wives. The first, Jennie, bore him two children who were Nima and Leon. Jennie died in Somerville, Massachusetts on January 11, 1872. The widower married Sarah Sanborn on April 23, 1873. That union produced a daughter, Agnes, who died in 1901 at the age of twenty-six. There is no proof as to whether she was married or as to whether she had issue except by negative inferences, i.e. the fact neither she nor issue is mentioned in her father's will or probate. I make that inference.

When Russell H. Conwell died in 1925 he left a will. By that instrument he left all his property to the aforesaid Nima and Leon. The will was allowed and letters of administration issued December 10, 1925. Again a charade was produced in Nantucket County, Massachusetts after this suit was begun when Michelle Carvotta, William Devine's attorney, was appointed Administratrix c.t.a. of a foreign will on November 11, 1982. The petition filed by a granddaughter of Russell Conwell has no probative value since the list of heirs excludes his heirs at his death and includes such unusual designations as granddaughters-in-law, not recognized by the law. M.G.L. Chapter 190, Section 3.

Nima Conwell became Nima C. Tuttle by marriage. She died in Huntington, Hampshire County, in this Commonwealth on April 23, 1950. Her husband, Edgar had predeceased her. She was survived by two children, Russell otherwise known as Peter (the name which I will now use) and Jane, and by two grandchildren, Russell (to be so-called) and Carol, the children of a deceased son Melsom who had died in 1924 while on transit from China to the United States. There is no probate of Nima Tuttle's estate in Hampshire County. Whether she left a will or had a probate in another jurisdiction was never proved or disproved.

Peter Tuttle died on July 18, 1968 while commorant in South Worthington, Massachusetts, but while a resident of New Jersey. His will admitted to probate in Monmouth County in the latter state makes no provision for the devise of real estate. He had no spouse and no issue. His heirs were his sister, Jane C. Tuttle and his niece and nephew Carol (now Christian) and Russell, the children of his deceased brother, Melsom. Under Massachusetts law Jane would take one half and Carol and Russell would split one half. M.G.L. Chapter 190, Section 3.

As for Jane C. Tuttle, she never married, and she died testate a resident of Worthington, Massachusetts on July 17, 1976. Except for a diamond ring, she left all her property to her nephew, Russell. The will was allowed. Russell Tuttle and Carol Tuttle Christian are plaintiffs in this case.

Russell H. Conwell's son was Leon M. Conwell who was born April 15, 1870. He died in Somerville, Massachusetts August 18, 1953, survived by a wife, Harriette, nee Brewster, and two children, namely Agnes C. Quinlan and Charles Conwell. There was a will which was duly allowed October 26, 1953. That will left all the testator's property to his widow. Harriette died August 14, 1960 testate. Her son, Charles, had predeceased her. After a specific bequest and some cash

legacies to his children and widow she left all her property to her daughter, Agnes C. Quinlan. Mrs. Quinlan is one of the plaintiffs in this case.

It is now time within these findings to leave a consideration of the various family trees. However before doing so, I note that, save one, none of the descendants, devisees or in-laws, who gave evidence in this trial either in person or by deposition had any recollection of any mention by a relevant ancestor of ownership by the ancestor or a family member of land on Nantucket Island. The one exception mentioned above was so strained in his testimony as to be unbelieveable on the point. I so find that he was unbelievable. Thus there was no evidence of a claim as described in this paragraph.

The lands in Share 10, Smooth Hummocks were to some greater or lesser degree assessed for the payment of real estate taxes in the late nineteenth century. I do not have to determine the detail of those assessments and of the payments made or omitted at that time. It is undisputed that no real estate taxes were assessed by the Town of Nantucket against any of Smooth Hummocks, Share 10 from 1903 until 1963. In 1963 John D. Gardner, II was clerk of the Board of Assessors for Nantucket. In that year for the first time in at least sixty years Share 10, was assessed by the Town. The assessment was against Winchester Vezie (sic) et al.[16] This assessment was invalid under M.G.L. Chapter 59, Section 11. It indicated an acreage of thirty (30) acres.[17] The reduction from forty-seven (47) to thirty (30) may have been justified by actual erosion as noted above. The tax for the year 1963 was fifty-four (54) cents based on a valuation of ten (10) dollars.

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[16] The phrase et al in no way saves the assessment. *Wood* v. *Wilson*, 256 Mass. 340 (1926).

[17] Plaintiffs introduced evidence to show that during certain years (1963 and forward) the acreage might have been shown on certain town records to be three acres. This Court does not find that evidence to be determinative of any material fact.

The Court takes judicial notice of the fact that the 1963 tax under the law was due and payable on or before November 1, 1963. The tax went unpaid. By instrument dated February 24, 1964 locus was taken for the delinquent taxes by the Collector of Taxes for Nantucket. The instrument of taking was duly recorded in Book 125 Page 448. By document dated March 27, 1964 and duly recorded in said Book 125 Page 551 the Town's interest in the taking was assigned to the aforesaid John J. Gardner, II for $15.38. After about two years Mr. Gardner caused the tax title to be foreclosed in this Court — the Land Court. He retained Attorney Roy. E. Sanguinetti to accomplish this task and notice of the foreclosure was recorded appropriately in Book 129, Page 162 on May 10, 1966. At the time Mr. Sanguinetti was representing Mr. Gardner, the lawyer was Town Moderator and Town Counsel for Nantucket. Both the petition to foreclose and the notice named as the only interested party: Winchester Vezie.[18]

Pursuant to a practice which was not unique to this particular tax title foreclosure, Sanguinetti recommended to the Land Court that it appoint the defendant Mooney as Land Court title examiner in connection with the tax lien foreclosure action. The defendant was in fact appointed. Cf. M.G.L. Chapter 60, Section 66. He made his report to this Court under date of June 24, 1966. He was paid the then standard fee of thirty-five (35) dollars.

While Mooney could not recall making the title examination in mid-1966, he admitted that he was so commissioned and that he filed the subject report. In his report he stated that Winchester Veazie "was the last known owner of the locus described in the petition." He recommended that notice be given to Winchester Veazie and to George Easton and listed both as being of Nantucket. The 1874 deed from Easton to Veazie showed the former as being of Nantucket but the latter as being of Boston. Mooney did not report the lot subdivision

[18] The spelling was Vezie and the phrase "et al" was omitted.

which Veazie had recorded[19] nor did he report the deeds by Veazie to Fox, Adams, Tilton, Hayes, Tinkham and Brewster.

At the time the defendant, Mooney made his report he had been practicing law for six years. While he was a lifelong native of Nantucket, he had practiced law in Boston from the date of his admission to the bar in 1960 until earlier in 1966. He was however familiar with Registries of Deeds in general and had some knowledge of the Nantucket Registry in particular.[20] This Court finds that the work done by Mooney for the Land Court in 1966 was negligently done. A title examiner applying the ordinary standards of a fallible member of that profession should have discovered and reported the omitted deeds and the subdivision plan. I will deal with the issue of fraud subsequently.

On the basis of Attorney Mooney's report notice of the tax lien foreclosure was given by publication in the only Nantucket County newspaper, The Inquirer and Mirror naming Winchester Veazie, Mrs. Winchester Veazie, both under two spellings, George Easton and Mrs. George Easton their heirs, devisees or legal representatives. This was done in January and February of 1967. This Court holds that *if* the assessment had been valid, the publication on Nantucket Island only would have been valid. Cf. M.G.L. Chapter 60, Section 66. While this Court recognizes that in fact the descendants or successors in title of the original grantees from Veazie and Fox were situated throughout the Commonwealth and in other states of the Union, the only common thread which can be used to determine proper publication is the location of the locus. This is Nantucket. A land owner must bear some responsibility as such owner. Here the plaintiffs and their predecessors in title neither paid taxes for at least sixty years nor watched out for their property and their interests therein. Throughout our

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[19] See Book of Plans 1, Page 94.

[20] This familiarity did not reach at that time nearly the extent of the experience gathered in subsequent years.

statutes and court rules, publication is prescribed to be in a newspaper published either in the municipality where the locus is situated, or, failing the existence of such a newspaper, in a newspaper published in the county where locus is situated. Cf. M.G.L. Chapter 4, Section 6, Chapter 185, Section 38, Chapter 244, Section 14, Chapter 215, Section 49.

On April 4, 1967 the Land Court entered a final decree in the tax lien case ordering "that all rights of redemption are forever foreclosed and barred. . . ." On May 10, 1967 John J. Gardner, II conveyed his interest in locus to Attorney Sanguinetti as trustee of an unidentified agreement of trust dated March 1, 1962. The consideration paid was less than one hundred (100) dollars. Three weeks later Sanguinetti sold locus to one Walter Beinecke, Jr. for $16,500.00. At the time of the purchase Mr. Beinecke who was interested in the restoration and development of the "grey lady of the sea" was taking steps to acquire various pieces of property on the island for conservation purposes. This Court specifically finds that whatever the collusion between Gardner and Sanguinetti, Mr. Beinecke was no party thereto. The transfer to him was an arms length transaction.

It was Mr. Beinecke's practice in 1967 and later to "register and confirm" in the Land Court the titles to all parcels of land which he purchased on the island. It was also his practice in acquiring land, and in registering the title to retain any of three attorneys whose offices were on Nantucket[21] and to equalize the work among them. In this case, strictly by coincidence Attorney Robert F. Mooney was selected. He was next in line for an assignment from Beinecke. In fact the latter's secretary actually made the selection in execution of her employer's policy. Mooney filed a petition for registration and confirmation on October 16, 1968. (Land Court Reg. #35851)

[21] They were the defendant, Mooney, Attorney James Glidden and Attorney Michael Driscoll. At that time there was no more than five or six attorneys in practice on Nantucket.

According to custom Mooney suggested a particular attorney for appointment as Land Court Title Examiner. Cf. M.G.L. Chapter 185, Section 37. He suggested Attorney Andre R. Sigourney with whom he had been associated in a Boston law firm and who was and has remained a friend. This appointment was made, and on January 27, 1969 Sigourney filed his report which since it commenced with and relied on the tax title foreclosure only covered a calendar period from 1967. The examiner reported that the petitioner, Beinecke, "has a 'good title as alleged, and proper for registration.' " The reported encumbrances — mortgage and easements — are not relevant to this suit. In May of 1976 apparently pursuant to an oral request by the Land Court Mr. Sigourney prepared and submitted a supplemental title report in the registration case. He brought to the attention of the Court — for its consideration in the Land Court registration case — certain irregularities concerning Sanguinetti as trustee with which I will deal hereafter. A different mortgage and a new federal tax lien were reported but they are not relevant to our considerations.

During the pendency of the registration case a well-publicized controversy erupted relative to certain tax taking procedures which had been used in, and by, the Town of Nantucket. These were assessments of real estate against "John Doe." In 1967 the Chief Judge of this Court ordered a moratorium on tax title foreclosures relating to Nantucket property where the assessment was against "John Doe." The District Attorney for the Southern District of Massachusetts convened a Grand Jury to investigate those assessing practices. No indictments were ever produced. The District Attorney did bring the subject matter to the attention of the Nantucket Board of Selectmen. In July of 1978 the defendant, Mooney, withdrew as counsel for the third party defendant, Beinecke, in the registration case because he was Town Prosecutor for Nantucket and was in conflict when the Town acted as

described below against Beinecke in the registration case and in the conflict of interest case. Attorney Wayne Holmes filed an appearance for Beinecke in the registration case.

Before referring further to the Town's action against Beinecke in the registration case, I must note the existence of a case in the Probate Court of Nantucket County. It is entitled *Sanguinetti* v. *Nantucket Construction Co.* (Equity #10) 5 Mass. App. 227. The Probate equity case did not have as its subject realty the same locus as the one with which we are concerned, but like locus the title to the realty dealt with in the Construction Co. case allegedly passed through Roy E. Sanguinetti Trustee of the Windswept Realty Trust. Knight, J., of the Probate Court ruled "that the Declaration of Trust was not in fact duly recorded with Nantucket Land Registration Office in accordance with the laws of the Commonwealth of Massachusetts, and that it could not be admitted in evidence. . ." in the case before him. I find that the Construction Co. case does not have a direct bearing on this case. It may have contributed to the motivation which caused the Town to take the next step in the registration case. I further find that the inclusion of an explanation of the Probate Court case in the examiner's supplemental report in the registration case establishes that the Land Court was, prior to issuing a registration decree, made aware that the Windswept Realty Trust existed subject to possible legal defects and that Attorney Sanguinetti's actions should be observed with skepticism.

Over the years the Town took the following actions. On July 17, 1974 the Town and Beinecke had executed and filed in the registration case a stipulation agreeing that "the decree of registration may be allowed" subject to certain rights reserved by the Town. Those reservations are not here relevant. Subsequently on April 21, 1978 the Town filed a motion to vacate the last described 1974 stipulation as well as to file a late answer in the registration case. Before he withdrew, Mooney on behalf of Beinecke assented to the motion. On June 23, 1978 the

Town began Land Court Misc Case #90801 against the present third party-defendant, Beinecke. It sought a declaration that the defendant's acquisition of locus — Share 10, Smooth Hummocks — was voidable because the defendant's predecessors in title Gardner and Sanguinetti in the acquisition of locus had violated M.G.L. Chapter 268A, the conflict of interest statute. In addition the Town sought reconveyance of Share 10 to it by Beinecke.

On January 11, 1979 Sulllivan, J. of this Court granted Beinecke's motion to dismiss the conflict of interest (Misc Case #90801) case. Her decision received direct appellate review from the Supreme Judicial Court, *Town of Nantucket* v. *Beinecke*, 379 Mass. 345 (1979) and was reversed. After certain other procedural exercises, a trial was held before Sullivan, J. in December of 1980. The judge issued a decision on March 26, 1981. That decision proclaimed that "the Town's complaint is time barred." Judgment issued for the defendant on the same day and on July 14, 1981 both sides filed with this Court a stipulation for waiver of appeals.

The amended complaint in the conflict of interest case (Ld Ct Misc 90801) set forth many facts material in this present case and upon which the plaintiffs rely in support of their claims. However Sullivan, J. in her decision specifically pointed out that "there are questions which now exist in relationship to the title (to Share 10) which will have to be explored ultimately by this Court."

Is it again necessary in these findings to retreat chronologically. In early 1979 the third party defendant was under certain cash-flow constrictions. As a result he agreed to sell locus to the defendant, Bewkes. The original terms of sale were modified when the buyer learned of the litigation involving locus. On March 27, 1979 Beinecke by deed conveyed Share 10, Smooth Hummocks to Bewkes for a stated consideration of $150,000.00 of which $5,000.00 was then paid in cash. Bewkes simultaneously gave a purchase money mortgage to

Beinecke to secure the payment of $145,000.00. The grantee further agreed that if the deal was completed to pay the $15,000.00 owed by Beinecke to the broker in the transaction. Furthermore the agreement required Beinecke to deliver to Bewkes a registered title to the land within two years. In the event that Beinecke was unsuccessful in procuring registration, the transaction was rescindable at the option of Bewkes. If the rescission took place Bewkes was free of all obligations except that he was not entitled to refund of the original $5,000.00 case which he had paid to Beinecke. In the event there was no rescission the mortgage note and broker's commission were to be paid immediately. It is clear that as of January 30, 1979 Bewkes knew of the pendency of the conflict of interest case and of the Town's late answer in the registration case.

In view of the remark quoted above from the decision in the conflict of interest case, and in view of the fact that on July 28, 1980, the Town of Nantucket filed, in the registration case a "Motion to Reopen Title Examination,"[22] supported by an affidavit of one, Stephen DeYoung, a title examiner, in which affidavit all of the material errors relevant to Mooney's title report in the tax foreclosure case were set forth in detail, I find that the Justice of this Court who authorized the final registration decree knew about the deficiencies attributable to Mooney's work before that Justice entered the registration decree.

The deed from Beinecke to Bewkes and the mortgage from Bewkes to Beinecke both of which were described above were duly recorded on April 6, 1979 in Book 170, Pages 1 and 2 respectively. Mr. Beinecke remained the named petitioner in the registration case for two years after the aforesaid conveyance. On July 9, 1981 Attorney Wayne F. Holmes who as previously recounted replaced Mooney as counsel for Walter

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[22] This Court apparently never acted on that motion.

Beinecke, Jr.[23] filed a "Motion to Substitute Petitioner" in the registration case. Mr. Bewkes did not specifically authorize that procedural step but had given authority to do anything necessary to complete the conveyance from Beinecke. This included completing the registration.

I have already detailed the work of Andre Sigourney who filed the original report and one supplemental rundown report as Land Court examiner in the registration case. In July of 1981 motivated by an oral direction from an official in the Recorders Office at the Land Court Robert Mooney who had previously withdrawn as counsel for Mr. Beinecke in the registration case submitted a second supplemental title examination rundown. That report covered the period from 1967 to July 1, 1981. It indicated that title was now in Mr. Bewkes. It made no mention of the existence of any other record owners of locus.

On November 30, 1981 Mr. Bewkes through counsel moved to restore the registration case to the active list. The motion was granted on December 2, 1981. On December 9, 1981 this Court issued a decree of registration and confirmation declaring the defendant-third party plaintiff in this case, E. Garrett Bewkes, Jr. to be the owner in fee simple of all of locus. The registered title was subject to certain encumbrances which are not relevant to this present case.

Notice of the Bewkes registration was duly recorded in the Nantucket County Registry of Deeds on December 11, 1981 in Book 188 Page 178. By deed dated December 16, 1981 and duly recorded on December 21, 1981 for consideration of $1.00 Beinecke gave a deed "to confirm the prior deed" to Bewkes of "an unregistered parcel severed from Land Court Reg Case No. 35851 and being shown on said Plan as 'Owner Unknown.' " At about the same time Bewkes paid off the aforesaid $145,000.00 mortgage and paid the aforesaid $15,000.00 broker's commission.

[23] Holmes represents Beinecke in this action. Attorney James Glidden represented Bewkes in the acquisition of locus but not herein.

The complaint in this present case was entered in the Superior Court on January 27, 1982 well within any time requirement of M.G.L. Chapter 185, Section 45. The action was transferred to the Land Court on April 1, 1982.

The plaintiff, William J. Devine, became involved in the situation which has given rise to this action because of his business activities over the last six years. He is a bounty hunter in titles. Thus far he has concentrated his efforts in Plymouth, Barnstable, Dukes and Nantucket Counties in this Commonwealth. In 1980 while searching through Land Court records in an effort to locate defective titles which might give rise to title challenges, Mr. Devine learned of the DeYoung affidavit mentioned above which contained findings relative to the title to locus. It is clear and I do find that DeYoung and Devine had worked on ventures such as the present one in the past and that the examiner had previously been paid by the plaintiff, Devine, in other cases. There was however no proof that Devine knew of locus until he read the affidavit in this Court.

Mr. Devine set about attempting to identify persons who might be heirs or successors in title of the Veazie and Fox grantees. By January of 1981 he had already located a number of such people. Attorneys and other agents of Devine had made telephone contact with these people. The telephone contacts were followed up by written communications in which Devine informed the addressees of his opinion that each was entitled to make a claim to ownership of certain undisclosed property which was in Massachusetts and which had been taken for the non-payment of real estate taxes. Devine offered in return for a promised share of the proceeds of a succesful litigation to institute and prosecute litigation at his (Devine's) own expense for the purpose of regaining title to the property. In each communication Devine offered three alternatives to the addressee including a buy out for a fixed sum. No one elected to take the fixed sum buyout.

Prior to September 1981 Devine had already succeeded in placing six of the original plaintiffs[24] to this suit under agreement. By the time the decree of registration entered in December of 1981 William Devine had secured the agreement of one more plaintiff.[25] Mr. Devine had standing to intervene in the registration case as of August 5, 1981 at which time he had a deed from Agnes Quinlan. By that time the conflict of interest case was gone. I find no laches chargeable against any of the plaintiffs in this case including Devine.

Mr. Devine's bargain with all of the other plaintiffs is essentially the same. In exchange for a fractural interest in portions of locus to be held in common with each of the purported heirs or successors in title of the original owners Devine who has complete control over this suit has agreed to underwrite the entire cost of this litigation without cost or risk to any of the other plaintiffs.[26] Other than the interest which Mr. Devine has gained in the premises by virtue of his agreements with, and deeds from, the other plaintiffs he was a stranger to the title of Share 10, Smooth Hummocks.

Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it. The champertor is to prosecute or carry on the suit at his own expense. *Pupecki* v. *James Madison Corp.*, 376 Mass. 212 (1978); *Sherwin Williams Co.* v. *J. Mannos & Sons*, 287 Mass. 304 (1934). Public policy opposes trafficking in lawsuits. Williston, Contracts Section 1715. It is not necessary that the champertor be a member of the bar for the agreement to be illegal. *Allen* v. *Batchelder*, 17 Mass. App. 453 (1984); *Graustein* v. *Boston & Maine RR Co.*, 304 Mass. 23 (1939). Champerty grew out of real estate cases

[24] Melba Norvell, Agnes Quinlan, Dorothy Stetson, Florence Anderson, Robert Cleaves and Mary Seymour.

[25] George Mascott.

[26] The other plaintiffs bear a proportionate cost of the litigation only if it is successful. Each share is to be charged with its prorated expenses if and when monetary distribution is made.

and questions of disseisen. *See Swett* v. *Poor*, 11 Mass. 549 (1814); *Joyce* v. *Dyer*, 189 Mass. 64 (1905); *St. Patrick's Religious, Educational & Charitable Assn* v. *Hale*, 227 Mass. 175 (1917). However it is still a doctrine, as defined above, which is very much alive. *See Graustein* v. *Boston & Maine RR Co., Ibid.* (1939); *Gill* v. *Richmond Co-op Assn*, 309 Mass 73 (1941).

A person is entitled to pay the legal expenses of another if he does so because he has some interest in the litigation. *Pupecki* v. *James Madison Corp., Ibid.; Reed* v. *Chase*, 238 Mass. 83, 86 (1921). Here Mr. Devine had no such interest. He acquired the interest only through the agreement alleged to be champertous. I find that all of Mr. Devine's agreements with the other plaintiffs or with their decendents or predecessors in title are champertous. The burden of proving champerty was on the defendants. *Hadlock* v. *Brooks*, 178 Mass. 425 (1901). They have borne their burden. Devine's agreements to bring suit, at his own expense, on behalf of the other named plaintiffs in this action in consideration of which he was to receive a percentage of any property interest recovered through such litigation, fall squarely within the traditional definition of champerty. A champertous contract is illegal and void. *Sherwin Williams Co.* v. *J. Mannos & Sons, Ibid.* At common law therefore these contracts would be unenforceable. This is an equitable proceeding, and equity will not enforce such a contract. A court of equity does not aid parties who themselves resort to unjust and unfair conduct. *Shikes* v. *Gabeinick*, 273 Mass. 201 (1930); *Davis & O'Connor Co.* v. *Shell Oil Co.*, 311 Mass. 401 (1942). It cannot be said that these agreements constitute a good faith effort to reasonably comply with Supreme Judicial Court Rule 3:05. Therefore as to the plaintiff Devine this Court dismisses the action. *See Fetters* v. *Wittner Oil & Gas Properties*, 258 Mich. 310 (1932). This Court recognizes that each of the other plaintiffs were respective parties with Mr. Devine to champertous contracts. I find however that

none of them initiated the contracts, and I hold that equity does not require dismissal of each of their claims because of those contracts.

I have held above that the 1963 tax assessment for Share 10, Smooth Hummocks upon which Bewkes' claim for registration was made and upon which the registration decree was based was invalid. The assessment was improper because it was not made against the record owner or owners as required by M.G.L. Chapter 59, Section 11. The plaintiffs[27] also raise the issue concerning the disproportionately small assessment which was actually designated in 1963. While the figure of ten (10) dollars looks suspicious I make no finding or ruling about that issue because I find that the plaintiffs, including Devine, did not prove by a preponderance of the evidence what the value of the real estate was as of January 1, 1963, the controlling date insofar as the adequacy of the assessment is concerned.

As stated above the plaintiffs request a review of a land registration and confirmation decree (Land Court Reg Case #35851) and a declaration that that decree is void and without force and effect. In this endeavor they rely upon M.G.L. Chapter 185, Section 45 which says the decree:

> "shall be conclusive upon and against all persons,.... whether mentioned by name in the petition, notice or citation, or included in the general description 'to all whom it may concern.' Such decree shall not be opened ...by any proceeding at law or in equity for reversing judgments or decrees; subject, however, to the right of any person deprived of land, or of any estate or interest therein, by a decree of registration obtained by fraud to file a petition for review within one year, after the entry of the decree, provided no innocent purchaser for

[27]From this point forward all reference to plaintiffs will exclude Mr. Devine except as otherwise stated.

value has acquired an interest. If there is any such purchaser, the decree of registration shall not be opened but shall remain in full force and effect forever . . . But any person aggrieved by such decree . . . may pursue his remedy in tort against the petitioner or against any other person for fraud in procuring the decree."

It is the contention of the plaintiffs that the decree of registration was obtained by fraud. Therefore it is for this Court to resolve the following issues:

(1) Were the plaintiffs deprived of land or an interest therein by the decree in question?
(2) Was the petition for review brought within one year of the entry of the decree of registration?
(3) Was the decree of registration obtained by fraud?
(4) Assuming there was fraud in the tax title acquisition and in the tax title foreclosure did that foreclosure decree act as a bar to the assertion of fraud more than ten years later?
(5) Are either Beinecke or Bewkes or both innocent purchasers for value?
(6) Assuming that the plaintiffs are barred by the answer or answers to any of the questions above may they pursue a tort action against either the defendant, Bewkes or the defendant, Mooney or both based upon fraud in procuring the decree?

Independent of the statute above quoted may the plaintiffs prevail against the defendant, Mooney? Incident to this latter issue are the two principal subordinate issues, to wit: (a) since any liability attributable to Mr. Mooney arises out of his performance as a Land Court Examiner is he immunized from liability, and (b) did his performance as a Land Court Examiner fall so short of an acceptable standard as to render him liable to these plaintiffs? Each of the above issues raise lesser questions with which this Court will deal as these findings proceed.

Previously in these findings, I determined that Robert F. Mooney was negligent when he made his report as the Land Court Examiner in the tax title foreclosure case. He later re-appeared as the final Land Court Examiner in the land registration case. At this latter time he was directed to perform the limited task of up-dating Andre Sigourney's supplemental examination for the Land Court. Reasonable practice would neither have required that he go from Nantucket to the Land Court to examine the case papers nor that he redo Sigourney's work or his own prior tax title foreclosure work. Thus he was negligent in 1966. He was not negligent in July of 1981.

Returning for the moment to the issues laid out just above, there is no doubt that the issuance of the decree in the land registration case deprives some of the plaintiffs in this case of land or an interest therein. Taking each family tree separately I hold that the plaintiffs claiming from Ellen F. Gould have not borne their burden of proof as specifically explained by me above. Thus George Stetson, George T. Mascott, Mary Seymour, Florence Anderson, Richard Bancroft, Patricia Gould Anglin and Zelwyn A. Aarons[28] must fail in their claims against both defendants[29] on the basis of standing.[30]

When we reach the successors in title to Andre Woodbury, I find that three of the plaintiffs standing in that stead should be Ines M. Teeling, Lester B. Woodbury, Jr. and Marion L. Jewell (individually and not as executrix). I am satisfied that Mrs. Jewell as executrix can represent her siblings and their rights should not be defeated on the basis of standing. I find that the plaintiff Melba W. Norvel has established herself as a successor in title to Andre Woodbury.[31]

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[28] Mr. Aarons also fails since, assuming the burden of proof had been borne re succession from Ella F. Gould and Amos D. Gould, Aarons is not a real estate title holder as stated above.

[29] Since it is now academic I am not determining the rights of these plaintiffs on the technical question of a fiduciary's interest in real estate.

[30] There is a separate failure on the part of the plaintiff Mascott to establish his standing as specifically found above.

[31] It is again noted that her brother, Norman E. Woodbury, who holds the same interest as Melba holds is not a party plaintiff. As noted above there is

The plaintiffs, Virginia Hart and Benjamin Page, have by a preponderance of the evidence failed to establish themselves as successors in title to Rufus A. Johnson.[32]

The plaintiff, Agnes Conwell Quinlan, has proven herself to be a successor in title to Russell H. Conwell, but the plaintiffs, Carol Tuttle Christian and Russell Tuttle have failed to prove this fact about themselves by a preponderance of the evidence.

It is obvious from the pleadings in this present case that this complaint was brought well within one year of the entrance of the registration decree in case #35851.

I now reach the third issue spelled out above. Was the decree of registration obtained by fraud? The answer to the question is No. Again I am not at this time making a determination of whether Mooney's actions in 1966 constituted more than negligence. In fact in order to answer question #3 I am assuming without finding that a fraud was committed leading to the entry of the tax title foreclosure decree. This fraud which I have assumed occurred in 1966 or before. It did not occur in 1981. Fraud consists of the misrepresentation of an existing material fact, made with knowledge of the falsity of the misrepresentation or with recklessness intending that there be reliance thereon, with such reliance, and with resultant damage from the reliance. *Graphic Art Finishers, Inc.* v. *Boston Redevelopment Authority*, 357 Mass. 40, 44 (1970). To emphasize: the cases and the texts state that a plaintiff must allege and prove that the plaintiff relied on the defendant's misrepresentation. Nolan, Tort Law, Mass. Practice Series Section 115. Because of the provisions of M.G.L. Chapter 185, Section 45 at this stage of the findings we are talking about fraud on the Land Court, not on a plaintiff. We are also talking of fraud in the obtaining of "a decree of registration." This

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also a distinct possibility that there exists a successor (or successors) in title to Chester P. Woodbury. These omissions do not jeopardize the rights of the other plaintiffs.

[32] It is again noted that the successors in title to Benjamin Johnson, Arthur Johnson and Nellie Johnson O'Connor have not been proven.

fraud would have to be by the original petitioner, Walter Beinecke, Jr., or by the ultimate registrant, the defendant, E. Garrett Bewkes, or by a person for whose conduct either was responsible. Mr. Mooney never represented Mr. Bewkes. I will not charge Mr. Beinecke in 1969 and thereafter when Mooney was his attorney for the registration with Mooney's conduct and knowledge in 1966 when Mooney was agent for another master, to wit: the Land Court. Furthermore by December of 1981 which is the date when the decree of registration was obtained the Land Court knew the true state of facts by means of the DeYoung affidavit (Ex. B-23) and by means of the opinion of Justice Sullivan in the conflict of interest case (Ex. B-13).

In this prior discussion I have skirted the answer to the question posed by issue #4 which I propounded originally. Is the tax title foreclosure decree entered April 20, 1967 final and a bar to an attack on the registration decree entered in December of 1981. M.G.L. Chapter 60, Section 64 says: "The title conveyed. . . . shall be absolute after foreclosure of the right of redemption by decree of the land court. . . ." *See Ryder* v. *Garden Estates, Inc.*, 329 Mass. 10 (1952); *Johnson* v. *McMahon*, 344 Mass. 348 (1962). While Section 69 of said Chapter provides for vacating a decree of foreclosure, Section 69A of the same provides ". . . no proceeding. . . shall be commenced by any person other than the petitioner except within one year after final entry. . . ." None of the plaintiffs herein were petitioners in the tax title foreclosure.

We still are left with the fact that the original assessment was invalid as found above and that the owners of record did not receive notice except general publication as prescribed by M.G.L. Chapter 60, Section 66 in that they were never named. The defendants urge the doctrine of laches. They argue that the plaintiffs were guilty of laches because at least Mr. Devine knew of the pendency of the registration case from sometime in 1980 and no plaintiff herein attempted to enter

that litigation before the decree was authorized, but they rather waited to attack it in this action a few months later. I find the facts upon which the argument is based to be true, but I rule that laches does not apply when based upon those contentions.

I do however find material similarities between this case[33] and the case of *Lancaster* v. *Foley*, 15 Mass. App. Ct. 967 (1983). Laches should not be applied if delay was based upon excusable neglect. To some degree the facts of this and the 1983 case can be distinguished but in the *Foley* case the Appeals Court says:

> "... there was only slight effort to establish facts... tending to excuse the failure to file timely answers.... Instead the appellants relied largely upon alleged *defects in the older tax title proceedings.*
>
> ....
>
> The potential *increase in land value* unquestionably led to the appellants' sudden interest in the land. ...The period, indeed, approached that required for acquisition of title by adverse possession (see G.L. c. 260, sec. 21) although the record does not show actual occupation and use of the land.... The judge also reasonably could treat the... claims as barred by the expiration of one year after the judicial... foreclosure....
>
> ....The record shows *no effort during that period (37 years) to pay taxes* on that land.... The judge in her discretion was justified in concluding that, in the face of *complete taxpayer inaction*, no equitable considerations required her to regard as a meritorious claim any alleged defects in the 1945 proceedings.
>
> ....the Land Court judge reasonably could consider statements....that they (the appellants) had not asserted any defects in the 1945 proceedings and the 1963 foreclosure *until persuaded to do so by a third party* who had agreed to pay their expenses...." (All of the emphasis is mine.)

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[33] See the specific findings thus far.

The Supreme Judicial Court has stated:

> "a taxpayer should know that the. . . . town will eventually sell his property if the taxes are not paid." *Guaranty Mortgage Corp.* v. *Burlington*, 385 Mass. 411, 419 (1982).

I thus find that the 1966 decree in Tax Lien Case #43095 creates a barrier under said Section 69A behind which these plaintiffs will not be allowed to go in a proceeding brought under said Chapter 185, Section 45.

If it were not for this last ruling, this decision as to Bewkes and in turn Beinecke might be different. Neither Walter Beinecke, Jr. nor E. Garrett Bewkes would qualify as a bona fide purchaser for value under the provisions of said Section 45. Both paid value in arms length transactions when each acquired title to Share 10 of Smooth Hummocks. Beinecke gave valid consideration in 1967, and Bewkes did the same in 1979. I find that as to Bewkes the controlling date is April 6, 1979, not December 31, 1981. Although neither man had chargeable actual knowledge, without my previous ruling both gentlemen would be charged with constructive knowledge of what was in the records of the Nantucket County Registry of Deeds. M.G.L. Chapter 183, Section 4. Neither however would be chargeable with the specific knowledge contained in either the DeYoung affidavit which was dated July 18, 1980 or the opinion in the conflict of interest case which was entered March 26, 1981. I found further that Beinecke is not chargeable with any knowledge Mooney might have had in 1966. Mooney was Beinecke's attorney in the registration case from 1969 to July 5, 1978. However, the plaintiffs have failed to prove that he had actual knowledge of the Veazie conveyances and the other information contained in the records of the Nantucket Registry of Deeds which he failed to report in the tax title foreclosure examiner's report.

Before dealing with question six (6) posed by me above, I must respond to plaintiffs' contention that this Court even

though recognizing the validity of the registration decree must impose a constructive trust upon the title held by E. Garrett Bewkes. A constructive trust is a device used in equity in order to avoid the unjust enrichment of one person at the expense of another where the legal title to the property, real or personal, was obtained by fraud or by certain other means not here material. *Barry* v. *Covich*, 332 Mass. 338 (1955). Such device does not depend upon intent of the parties. *Monach* v. *Koslowski*, 322 Mass. 466 (1948). Such a remedy is consistent with a court's recognition of the uncontestability of a Land Court registration decree under M.G.L. Chapter 185, Section 45. The declaration of a constructive trust and thus restitution in this case would leave the Land Court judgment intact. *Kozdras* v. *Land/Vest Properties, Inc.*, 382 Mass. 34, 45 (1980). Since the remedy of restitution operates only against the person, a holding of the same does not run counter to the land registration act's purpose of furnishing good faith purchasers with a ready and reliable means of ascertaining title to land. *State Street Bank and Trust Co.* v. *Beale*, 353 Mass. 103, 107 (1967).

It is well settled law in this State that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge. *Yorke* v. *Taylor*, 332 Mass. 368 (1955). It is not necessary to make any further proof of an actual intent to deceive.

Both Beinecke and Bewkes paid value for locus. Neither had the intent to deceive any of the plaintiffs. Neither made any statements or representations to any of the plaintiffs. Beinecke initiated the petition for registration in 1969. It was his policy to do this with substantially all land he purchased on Nantucket. He had no actual knowledge that the title to Share 10 was in any way questionable when he executed the petition for

registration in 1969. He made oath to the truth of the same. The petition did not acknowledge any claims by any of the plaintiffs.

When Bewkes offered to purchase locus from Beinecke, he did not know of any title defects, but, before an agreement was reached, he learned of "a case"[34] and thus modified his offer and agreement to purchase to put at risk, in the event the case went in favor of the Town, only five thousand ($5,000) dollars. In view of these holdings Bewkes is not liable to any of the plaintiffs, and no constructive trust will be imposed on his title by this Court. The Court is further supported in this ruling by its prior findings and holding relative to laches since most of the reasoning of the *Foley* case is applicable to the plaintiffs herein when considering this request for equitable relief.

Finally we come to that part of this suit which is focused on the defendant, Attorney Robert F. Mooney. He is accused of fraud and breach of a fiduciary duty. I will dispose of the matter of the latter contention first. It is my finding that the plaintiffs have not sustained the burden of proving (1) that Mooney owed a fiducary duty to them or to any of them or (2) that he breached any fiduciary duty. *Adams* v. *Adams*, 331 Mass. 354, 358 (1954).

The allegation of fraud is not as simple. The issues already mentioned deal with any immunity Mr. Mooney had as a Land Court Examiner and whether he breached any duty he had. Implicit in the latter are the following questions: (a) Did such breach constitute fraud? (b) Are any of the plaintiffs persons to whom Mooney owed a duty? (c) Are claims of the plaintiffs barred by any statute of limitations?

Prior to the enactment of M.G.L. Chapter 258 in 1978, the doctrine of sovereign immunity was reviewed in 1976. *Whitney* v. *Worcester*, 373 Mass. 208 (1976). Since this Court has

[34] I find that the case about which he learned was the conflict of interest case involving locus.

previously in these findings stated—and restates here—that the title rundown done by Mr. Mooney by oral direction from the Land Court in 1981 was in no way improper and in no way makes him liable to any of these plaintiffs. I am only considering his Land Court tax title foreclosure exam of 1966 when I determine whether he is guilty of fraud. The key date is 1966 and thus said Chapter 258 does not apply. The *Whitney* case which can be applied to the 1966 conduct states:

> "Was the injury-producing conduct an integral part of governmental policy-making or planning? Might the imposition of tort liability jeopardize the quality and efficiency process? Could a judge or jury review the conduct in question without usurping the power and responsibility of the legislative or executive branches? Is there an alternative remedy available to the injured individual other than an action for damages?"

Mooney's duty and actions did not involve planning or policy-making. The imposition of tort liability would not jeopardize quality and efficiency. It might even motivate one toward the same. The conduct could be reviewed without usurpation of the power of any branch including the judicial. It is unlikely that an alternative remedy is available.[35] It can also be added that if Mooney's actions or omissions rise to the level of fraud, the last thing any court or policy wishes to accomplish is a protection by immunity of fraud. Under the discretionary/ministerial test established in *Whitney*, there can be no question that a court appointed title examiner, in the preparation of a title report is generally engaged in the type of ministerial conduct to which sovereign immunity does not apply.[36] Furthermore it would never apply where the

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[35] Witness the prior parts of this decision.

[36] I can imagine in some instances where the examiner might have to give an opinion which could go either way, e.g. interpretation of an ambiguous description and in such instance sovereign immunity would apply here because the performance was discretionary. Such was not the case here.

examiner engaged in fraud or deceit. In view of the plaintiffs' allegation no further consideration of immunity is necessary.

As established prior hereto in this decision, if fraud or deceit occurred, it occurred in 1966. Therefore the appropriate statute of limitations is M.G.L. Chapter 260, Section 2A inserted by Statute 1948, Chapter 274, Section 2 which provides that an action of tort of this character must be commenced "within two years next after the cause of action accrues."[37] The question is: When did the cause of action accrue? Generally a cause of action accrues when the misrepresentation is made or when the deceit takes place. *Brackett* v. *Perry*, 201 Mass. 502 (1909); *Connelly* v. *Bartlett*, 286 Mass. 311 (1934); *Brodeur* v. *Amer. Rexoil Heating Fuel Co.*, 13 Mass. App. 939 (1982). Nevertheless to the extent that any misrepresentation concerns a fact or facts which were inherently unknowable by the plaintiffs at the time of the fraud or deceit the cause of action arises when the plaintiffs learn of the misrepresentation. *Friedman* v. *Jablonski*, 371 Mass. 482 (1976); *Kent* v. *Dupre*, 13 Mass. App. 44, 47 (1982). I find that the facts which Mooney reported to the Land Court in 1966 and the facts which he should have reported to the Land Court at that time were inherently unknowable to the plaintiffs. I further find that William J. Devine was the first plaintiff to learn the true facts about the title to Smooth Hummocks, Share 10. These were the facts that should have been reported to the Land Court by its examiner. He also was the first plaintiff to learn what had been reported to the Land Court. He learned all these facts by reading the DeYoung affidavit in the Court, by reading the registration case in the Land Court, by talking with DeYoung and by checking the records in the Registry of Deeds for said Nantucket.

Mr. DeYoung's affidavit is dated July 18, 1980. Devine could not have read it before that date. Even if I impute his knowledge to all the other plaintiffs which I do since he was

[37] A 1973 amendment increased the statute to three (3) years.

their agent throughout the campaign to acquire their participation and the process of prosecuting this case, the statute of limitations could not have run against any plaintiff until July 18, 1982. This action was commenced January 27, 1982.

It is clear to me that Attorney Mooney breached the duty which he had to the Land Court when he made his report in 1966. Whether his actions or omissions amounted to negligence or fraud, he breached his duty. That breach constituted fraud. I find that the true facts which were contained in the records of the Registry of Deeds were so apparent and so available that Mooney's failure to report them was either planned with the intent to defraud the Land Court or occurred with such wilful disregard of the facts as to be tantamount to fraud. *State Street Bank & Trust Co.* v. *Beale*, 353 Mass. 103, 104 (1967). I emphasize that the evidence only supports wilful disregard tantamount to fraud. Unfortunately the examiner not only missed the notation of a continuation of the grantor schedule in one consolidation of the grantor index and thus deeds affecting locus but he missed conveyances affecting locus in two other consolidations. Added to these is the failure to report a subdivision plan which could easily have been found in the Registry of Deeds. This latter oversight continued up to and during Mooney's testimony at this trial.

In *Kozdras* v. *Land/Vest Properties, Inc.*, 382 Mass. 34 (1980) the Supreme Judicial Court said:

> "While the facts in the case at bar are not so egregious as the facts in the *State St. Bank* case, we agree with the judge that the statements made by the defendants in their petition were 'contrary to fact yet susceptible of accurate knowledge,' and . . . disregard of the facts as shown *by the official records* (emphasis mine) brings this case within the ambit of our language in *State St.* . . . . the evidence is overwhelming that the (defendant) acted in reckless disregard of the actual facts. . . ."

Attorney Mooney acted in reckless disregard of the actual facts. The Land Court relied thereon since it entered a tax title foreclosure decree after giving notice only to those named by Mooney in his report. It was foreseeable that such disregard would harm an ascertainable person, class or group of individuals.

We are left with the question whether any of the plaintiffs are persons who may recover given the defendant-Mooney's fraud. A plaintiff must prove that his damage results directly from the defendant's fraud. Recovery can be had only for specific, actual and proven harm. *Sharatt* v. *Housing Innovations, Inc.*, 365 Mass. 141 (1974).

In this case there was no privity between Mooney who was appointed by the Land Court and paid a fee set by this Court. Whether the fee was paid to the Court and then to Mooney or whether it was paid directly by the petitioner in the 1966 case to Mooney has not been proven. This Court however will take judicial notice of the fact that the fees ultimate source was the petitioner.

Whether recovery can be had in Massachusetts for negligent or grossly negligent misrepresentation relied upon by one not in contractual privity with the defendant is an open question. *Blank* v. *Kaitz*, 350 Mass. 779 (1966); *See Craig* v. *Everett M. Brooks Co.*, 351 Mass. 497 (1967). As an attorney and certified Land Court Title Examiner Robert Mooney knew or should have known the purpose for which his 1966 report was to be used. He should have known that the failure to correctly designate the persons to whom notice should have been sent or given by publication would have the likely result of depriving unnamed persons of their rights in locus. On this basis I find that the defendant, Robert F. Mooney, is liable in damages to those plaintiffs who have not been the subjects of prior adverse findings and rulings by this Court in this decision.

Damages in an action for fraud are to be calculated by one of two methods. The first rule is called "the benefit or loss of

the bargain" rule. *Danca* v. *Taunton Savings Bank*, 385 Mass. 1 (1982); *Rice* v. *Price*, 340 Mass. 502 (1960). The use of such a rule in this case would be singularly inappropriate. This case calls for damages resembling restitution. Thus the second rule entitled "the out of pocket" rule is proper in this case. *National Shawmut Bank* v. *Johnson*, 317 Mass. 485 (1945), Restatement, Second, Torts Section 549. The controlling date for calculating damages is the date this suit was commenced, to wit: January of 1982.

Because of prior findings and rulings none of the plaintiffs claiming through Ellen F. Gould and none of the plaintiffs claiming through Rufus A. Johnson is entitled to damages. William J. Devine is not entitled to damages. Since this Court has found him to be the initiator of champertous contacts and transactions, the Court for the purpose of determining damages holds that the contracts obtained by Devine and the deeds given by the other plaintiffs to him pursuant thereto are void. He holds no interest in any of locus.

The plaintiffs entitled to damages are Agnes Conwell Quinlan claiming from Russell H. Conwell and Ines M. Teeling, Lester B. Woodbury, Jr. and Marion L. Jewell claiming from Andre Woodbury. According to the proof made herein Mrs. Quinlan holds an undivided one-quarter interest in the lands acquired by Conwell. I find that these lands had a total value as of January 1982 of $120,000.00. One quarter of that is $30,000.00 which are Mrs. Quinlan's damages. Mrs. Jewell, Mrs. Teeling, and Mr. Woodbury, Jr. all acting through Mrs. Jewell as executrix proved that they each held an undivided one-ninth (1/9) interest in the land derived from Andre Woodbury. I find that land to have a total value of $90,000.00. One ninth of that is $10,000.00. Since neither Mrs. Teeling nor Mr. Woodbury, Jr. is a party to this action the judgment in the appropriate total amount of $30,000.00 will enter for Marion L. Jewell as executrix of the will of Lester B. Woodbury to be held $10,000.00 each for herself individually, Mrs. Teeling

and Mr. Woodbury, Jr. Melba W. Norvel proved that she held an undivided one-sixth (1/6) interest in the land derived from Andre Woodbury. Based on the aforesaid total value I find that one-sixth is $15,000.00.[38] Those are her damages.

In summary then:

(1) I find for the defendant, E. Garret Bewkes against all plaintiffs under all claims and remedies contained in the pleadings.

(2) In view of (1) just stated I find for the third party defendant Walter Beinecke, Jr. against the third party plaintiff E. Garrett Bewkes.

(3) I find for the plaintiff Agnes Conwell Quinlan against the defendant Robert F. Mooney in the amount of $30,000.00 on the count alleging fraud.

(4) I find for the plaintiff Marion L. Jewell as she is executrix of the will of Lester B. Woodbury, Sr. against the defendant, Robert F. Mooney in the amount of $30,000.00 on the count alleging fraud, said sum to be held and distributed by her as specified above.

(5) I find for the plaintiff, Melba W. Norvel against the defendant Robert F. Mooney in the amount of $15,000.00 on the count alleging fraud.

(6) I find for the defendant Robert F. Mooney against all plaintiffs on the count alleging breach of fiduciary duty.

(7) I find for the defendant Robert F. Mooney against all plaintiffs except said Quinlan and said Jewell and said Norvel on the count alleging fraud.

(s) GEORGE C. KEADY, JR.
GEORGE C. KEADY, JR.
Justice of the Superior Court
sitting under statutory assignment in the Land Court

DATED: December 10, 1985

[38] This Court makes no finding yea or nay as to whether said Quinlan or said Jewell or Norvel or any of them owes any obligation to plaintiffs' counsel on the basis of quantum meruit. The Court does find that that counsel carried out their duties conscientiously and with apparent skill.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH

AT BOSTON, AUGUST 17, 1987.

IN THE CASE NO. SJC-4295

CAROL TUTTLE CHRISTIAN & OTHERS

v.

ROBERT MOONEY & OTHERS,

WALTER BEINECKE, JR.,

THIRD-PARTY DEFENDANT

Pending in the Land Court Department of the Trial Court for the County of Suffolk

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No. 106538-Equity

ORDERED, that the following entry be made in the docket; viz.,—

Those portions of the judgment ordering recovery by certain plaintiffs against Mooney are vacated. A judgment shall be entered as before, that judgment should be entered in favor of Bewkes against all plaintiffs, and in favor of Beinecke as third-party defendant.

BY THE COURT,

JEAN M. KENNETT, *Clerk.*

AUGUST 17, 1987
See Opinion on File

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
ROOM 1412 COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8055

JEAN M. KENNETT
Clerk

FREDERICK J. QUINLAN
Assistant Clerk

October 1, 1987

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Dear Attorneys:

RE: AGNES CONWELL QUINLAN & others
vs. ROBERT F. MOONEY, Defendant and
Third-Party Plaintiff, & others
Supreme Judicial Court No. SJC-4295

The Motion of the plaintiff-appellant, William J. Devine, to File Appended Material to his Petition for Rehearing has been allowed. The Petitions for Rehearing have been considered by the court and are denied.

Very truly yours,
(s) DOLORES G. DUPRE
DOLORES G. DUPRE
for JEAN M. KENNETT, Clerk

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[SEAL] COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, SS MISCELLANEOUS

CASE NO. 106538

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, RUTH DEITRICH TUTTLE, DOROTHY STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, FLORENCE ANDERSON, RICHARD BANCROFT, PATRICIA G. ANGLIN, AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART, MELBA W. NORVELL, AND MARION L. JEWELL,

PLAINTIFFS

vs.

ROBERT F. MOONEY,

DEFENDANT

vs.

E. GARRETT BEWKES,

DEFENDANT & THIRD-PARTY PLAINTIFF

vs.

WALTER BEINECKE, JR.,

THIRD-PARTY DEFENDANT

JUDGMENT

This cause came on to be heard and was argued by counsel, and upon consideration thereof it is

ADJUDGED and ORDERED that judgment enter for the defendant, E. Garrett Bewkes against all plaintiffs under all claims and remedies contained in the pleadings; and it is further

ADJUDGED and ORDERED that judgment enter for the third party defendant Walter Beinecke, Jr. against the third party plaintiff E. Garrett Bewkes; and it is further

ADJUDGED and ORDERED that judgment enter for the plaintiff Agnes Conwell Quinlan against the defendant Robert F. Mooney in the amount of $30,000.00 plus interest on the count alleging fraud; and it is further

ADJUDGED and ORDERED that judgment enter for the plaintiff Marion L. Jewell as executrix of the will of Lester B. Woodbury, Sr. against the defendant, Robert F. Mooney in the amount of $30,000.00 plus interest on the count alleging fraud, said sum to be held and distributed by her as specified in the Findings, Rulings and Decision in the above-captioned matter issued on this date; and it is further

ADJUDGED and ORDERED that judgment enter for the plaintiff, Melba W. Norvel against the defendant Robert F. Mooney in the amount of $15,000.00 plus interest on the count alleging fraud; and it is further

ADJUDGED and ORDERED that judgment enter for the defendant Robert F. Mooney against all plaintiffs on the count alleging breach of fiduciary duty; and it is further

ADJUDGED and ORDERED that judgment enter for the defendant Robert F. Mooney against all plaintiffs except said Quinlan and said Jewell and said Norvel on the count alleging fraud aforesaid.

BY THE COURT (KEADY, J.)

attest:
Charles W. Trombly, Jr.
Recorder

DATED: December 10, 1985

A TRUE COPY
ATTEST:

s/CHARLES W. TROMBLY, JR.
Recorder

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss No. 4295

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, GEORGE STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, G. THEODORE MASCOTT, JR., RICHARD BANCROFT, PATRICIA GOULD ANGLIN, AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART, MELBA W. NORVELL, AND MARION L. JEWELL,
PLAINTIFFS, APPELLANTS,

v.

ROBERT F. MOONEY AND
E. GARRETT BEWKES,
DEFENDANTS, APPELLEES.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Carol Tuttle Christian, Russell Tuttle, George Stetson, George T. Mascott, Mary Seymour, G. Theodore Mascott, Jr., Richard Bancroft, Patricia Gould Anglin, Agnes Conwell Quinlan, William J. Devine, Zelwyn A. Aarons, Benjamin N. Page, Virginia P. Hart and Melba W. Norvell, the Plaintiffs, Appellants above named, hereby appeal to the Supreme Court of the United States from the final Order of this Court, entering judgment in favor of defendants, appellees, entered herein on August 17, 1987, and the Order of this Court denying the applications for rehearing of plaintiffs, appellants, entered herein on October 1, 1987.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

By their attorneys,

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Attorneys for plaintiff, appellant William J. Devine

Filed: December 29, 1987

MASSACHUSETTS GENERAL LAWS, CHAPTER 185

§45. Judgement of Confirmation, and Registration; Effect

If the court, after hearing, finds that the plaintiff has title proper for registration, a judgment of confirmation and registration shall be entered, which shall bind the land and quiet the title thereto, subject only to the exceptions stated in the following section. It shall be conclusive upon and against all persons, including the commonwealth, whether mentioned by name in the complaint, notice or citation, or included in the general description "to all whom it may concern". Such judgment shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees; subject, however, to the right of any person deprived of land, or of any estate or interest therein, by a judgment of registration obtained by fraud to file a complaint for review within one year after the entry of the judgment, provided no innocent purchaser for value has acquired an interest. If there is any such purchaser, the judgment of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal as provided by law from time to time. But any person aggrieved by such judgment in any case may pursue his remedy in tort against the plaintiff or against any other person for fraud in procuring the judgment.

CHAPTER 60

§69A. Time for vacating, etc., of decree entered under §69 by person other than petitioner.

No petition to vacate a decree of foreclosure entered under section sixty-nine and no proceeding at law or in equity for reversing or modifying such a decree shall be commenced by any person other than the petitioner except within one year after the final entry of the decree if the decree is entered on or after September first, nineteen hundred and forty-five or within one year after said date if the decree was entered prior to said date.

R. R. Powell, *Registration of the Title to Land in the State of New York (with Supplements as to Experience Elsewhere)* (1938) p. 177, n. 32

In a speech delivered to a Section of the American Bar Association in Boston On August 25, 1936, Judge Charles Thornton Davis told this anecdote as to the argument of the Tyler case in the United States Supreme Court. The case was argued for the Land Court by Attorney General Hosea Knowlton of Massachusetts, a distinguished and elderly gentleman accustomed to raucous whisperings. Judge Davis sat beside Mr. Knowlton during the argument. Mr. Justice White turned to Mr. Knowlton and said: "Mr. Attorney General, what is there in this law to prevent free and unbridled collusion between the Court and the lawyers and petitioners?" The Attorney General settled himself back and responded: "Absolutely nothing, Your Honor, except the traditional character of the Bench and Bar of Massachusetts." There was a pause and all of the other judges turned and bowed to Mr. Justice Horace Gray, who had begun his distinguished judicial career in Massachusetts. Then in a tense whisper that could be heard all over the court room the elderly Attorney-General turned to young Judge Davis and said: "By God, boy, you remember that!"

This anecdote raises a problem deserving careful thought in New York.

THE COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

NANTUCKET, ss MISCELLANEOUS

CASE NO. 90801

TOWN OF NANTUCKET,
PLAINTIFF
v.
WALTER BEINECKE, JR.,
DEFENDANT

DECISION

By order dated January 11, 1979 this Court granted a motion to dismiss made by the defendant, Walter Beinecke, Jr. ("Beinecke"), on the ground that the complaint by the plaintiff, Town of Nantucket (the "Town"), was time barred. The Supreme Judicial Court reversed and held that this Court had erred a) by taking judicial notice of the supposed impact of a probate court decision in which conduct of the then Nantucket town counsel was criticized[1] and b) by then holding, based on imputed awareness of such decision, that the Nantucket Board of Selectmen must have had knowledge of the conduct complained of no later that September 19, 1975. The Supreme Judicial Court agreed, however, with this Court that there was a statute of limitations applicable to General Laws, Chapter 268A, and that it was two years for the period here in question. The complaint first was filed in this case on June 23, 1978 so it is time barred if the Town knew or reasonably should have known of the conduct complained of prior to June 23, 1976. See *Franklin* v. *Albert*, Mass. (1980).[2] *Teller* v. *Schepens*, Mass. (1980).[3]

[1] *Nantucket* v. *Beinecke*, Mass. Adv. Sh. (1979) 2623.
[2] Mass. Adv. Sh. (1980) 2187.
[3] Mass. Adv. Sh. (1980) 2199.

After the decision of the Supreme Judicial Court in December of 1979 the Town moved to amend its complaint, and its motion was allowed. The complaint, as amended, alleges that one Winchester Veazie had conveyed out most of the locus as described in Land Court Tax Lien Case No. 43095 and Registration Case No. 35851 by 1874, that he never reacquired title thereto, that for many years prior to 1963 the land was not assessed, that one of the tax assessors, John J. Gardner II, first caused the locus to be assessed in 1963 to John Doe and thereafter to Winchester Veazie, that Gardner knew or should have known that Veazie was not the record owner of much of the locus and presumably was long deceased, that accordingly the taxes would not be paid and that ultimately the land would be taken and the tax title assigned, on Gardner's request, to Gardner acting for his undisclosed principal, Roy E. Sanguinetti, and that this in fact did occur. The complaint further alleges that the petition in the tax lien case and the examiner's report therein are both false in stating that Veazie was the only owner of the equity and that this constituted a fraud in the Land Court. The other allegations in the case are substantially the same as in the original complaint. The new element in the amended complaint is the alleged conveyance out by Veazie of a substantial portion of locus.

After the allowance of the amendment the defendant moved to dismiss the amended complaint on grounds other that that it was time barred and later moved for summary judgment. Both motions were denied. In ruling on the latter, I stated

> If the defendant can establish that the Town officials whose knowledge, consistent with G. L. c. 260, §2A, would bind the Town and start the statute running had such knowledge for more than two years prior to the commencement of this action, then it is time barred. It therefore seems to me to be essential first to determine this aspect of the case before proceeding to a consideration of the other issues in this case and in Registration Case No. 35851 in which the defendant seeks to register his title to the disputed land in proceedings pursuant to G. L. c. 185.

I further stated

> Having studied the affidavits and deposition I have concluded that not all factual issues as to the Town's knowledge have been resolved but rather remain in the case, not only as to the extent of the knowledge of counsel but as to the independent knowledge of the Selectmen. It seems clear to me from the opinion of Justice Liacos that Nantucket's complaint can be time barred by something short of full disclosure to a town meeting, but it is not clear that knowledge of town counsel, even if he is not personally engaged in the wrongdoing, always suffices. I have inferred from the Supreme Judicial Court opinion that under circumstances such as we have here informed knowledge of the Board of Selectmen must be shown. This can best be shown, if indeed this is the case, by a hearing at which testimony limited to this sole issue is taken. Accordingly I order that discovery be concluded by October 15, 1980 and this case be assigned for trial on this issue only in Nantucket.

A trial was held on this issue only in Nantucket on December 3 and 4, 1980 and in Boston on December 29, 1980. At the trial a stenographer was appointed to record the testimony with all exhibits introduced into evidence being incorporated herein for the purpose of any appeal. Oral arguments were heard by the Court on January 8, 1981.

On consideration of all the evidence I again find and rule that the Town's complaint is time barred. I assume for the purpose of this decision that the allegations of the complaint as to the state of the record title are correct, and I further assume that the Town did not have actual (as opposed to constructive) notice of the Registry records as to the Veazie title until well after the decision of the Supreme Judicial Court in this very case. However, I find and rule that the state of the record, falsified as it may have been in the tax lien case, is not substantially different from the so-called Nantucket "John Doe" cases

which came under scrutiny in the 1960's and the succeeding decade. I think the following facts which on all the evidence I hereby find will clarify the result which I have reached:

1. Henry Long, the then Commissioner of Corporations and Taxation, pressured communities during the depression years to put as much of their unassessed real estate as possible on the tax lists. Whether this may have been partially responsible for the situation which developed in Nantucket is speculative. It is undisputed, however, that the title to Nantucket real estate has been beset with problems which over the years has led to the registration of the title to many properties under the provisions of G.L. c. 185. With the passage of time many of these problems were acerbated, and the assessors faced increasingly difficult problems in determining ownership for tax purposes. This problem is discussed by the Supreme Judicial Court in *Hardy* v. *Jaeckle*, 371 Mass. 573 (1976). The difficulty of determining ownership led to a widespread practice in Nantucket whereby individuals who became aware of parcels of land on the island which had not been assessed requested the assessors to assess the property to "John Doe" which apparently then was done routinely. After "John" neglected to pay these taxes, the property was taken, and the tax title then was assigned to a third person.

2. The abuses which this practice allegedly engendered led to widespread discussion of it in Nantucket both at meetings of the Selectmen and at town meetings, particularly in the time frame of 1967 through 1973.

3. During the late 1960's and early 1970's there was a crescendo of protest, not so much as to the method of assessment, but as to the disposition of the tax titles. The gist of the complaints was that a favored few acquired title to the lands whose values continually were escalating whereas other inhabitants did not have similar opportunities.

4. One of the three assessors in Nantucket, at least from 1964 to 1972 when he resigned,[4] was John J. Gardner, II.[5] Town counsel during this period until his resignation in December, 1969 was Roy E. Sanguinetti. Both Mr. Gardner and Mr. Sanguinetti are now deceased. The town treasurer, until sometime in 1969 when her husband was transferred from the island by the weather bureau and she resigned, was Margaret M. Roche.

5. In due course the question of validity of the Nantucket tax titles came to the attention of Elwood Hettrick, the then Chief Judge of the Land Court, and he appointed Haughton Sanguinetti to investigate the situation. Mr. Sanguinetti was the brother of the Nantucket town counsel, but as a result of his recommendations to the Court a moratorium was imposed in 1967 on the entry of decrees following the equity of redemption where taxes had been assessed to John Doe.

6. The complaints prevalent in Nantucket led the Selectmen to confer with Mrs. Roche in April, 1969 about her practice of assigning tax titles. She told them that she assigned the tax title to the first person who requested it. Her procedure, she said, was "first come, first served." She also has been quoted as saying that if any person went to the trouble to locate property not on the tax rolls, to bring it to the attention of the assessors and then to request an assignment after the tax taking, she felt that their perseverance should be rewarded.

7. The annual 1969 Nantucket town meeting adopted a proscription against further assignment of tax titles without a public auction. This article in the warrant was attacked by John Gardner in the public press as being without the power of the town meeting since the General Laws gave the treasurer the discretion to dispose of tax titles by assignment and

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[4] Mr. Gardner's tenure as an assessor appears to have covered a period of over fifty years.

[5] The evidence in this case centers on Gardner's role in the scheme; no light is shed in this or other cases on the activities of the other assessors.

without public auction. Mrs. Roche also took this position. The General Laws, of course, have since been amended. G. L. c. 60, §52 as amended by St. 1973, c. 249. Whether the vote of the town meeting was legally binding or not, the practice of assignment without notice or foreclosure terminated.

8. One of the persons who protested the method of disposition of tax titles was Captain Parker Gray, Chairman of the Nantucket Conservation Commission, who bombarded the Selectmen with so-called data sheets in which he attacked John Doe assessments and the transfer of tax title property. He also specifically mentioned locus, its assessment to Gardner and sale to Sanguinetti and later to Beinecke. He also attended many of the meetings of the Selectmen to protest the tax situation generally and the disposition of town lands in particular. Letters to the local newspaper from Captain Gray and others also appear among the exhibits. The statements set forth in Captain Gray's data sheets were not always accurate, but if not a whole ear, thay had at least many kernels of truth within them. Locus is referred to in the evidence as land at Reedy Pond, and the record is replete with references to it and suggestions of impropriety in connection therewith. There were other members of the community who also objected to the method of assignment of tax titles on the theory that insiders were able to obtain the assignments where general members of the public could not.

9. The complaints by Parker Gray and others led Robert Haley, Chairman of the Board of Selectmen, in at least one heated exchange reported in the Nantucket Inquirer and Mirror of February 24, 1972 to tell Captain Gray to take his complaints to the District Attorney or the Attorney General.

10. The Land Court then, as now, customarily does not review a back title in a registration proceeding based on a foreclosed tax title other than to check possible easements and restrictions not cut off by its final decree in the tax lien case and to review the description. Rather the practice has been to

assume good title in the petitioner in the tax lien case after the entry of the final decree and to have the Land Court examiner bring the title forward from that date. Counsel for the defendant in our present case aptly had denominated this procedure as "piggybacking." This is the method which Gardner and Sanguinetti intended to follow in the present case.

11. John Gardner, as noted above, was only one of the three assessors, but he appears to have been the authoritive figure on the Board. For purposes of this decision I have assumed that it was him who had locus assessed to Winchester Veazie as set forth above. Taxes were not paid, and the property was taken by the Town by deed dated February 24, 1964 and recorded with Nantucket Deeds in Book 125, Page 448. A petition to foreclose the tax lien was filed on behalf of Mr. Gardner by Roy Sanguinetti on May 11, 1966, and the title was referred to Robert F. Mooney, Esquire, to determine the persons who might be interested in the petition. Mr. Mooney is counsel for Mr. Beinecke in the present registration case still pending before the Court. In response to a letter from Bernard W. Berkowitch, Chief Title Examiner, requesting a report in detail as to "what diligent search you made for the heirs of Winchester Vezie (sic) and George Easton," Mr. Sanguinetti replied as follows:

> With reference to your letter of March 28 pertaining to Tax Lien Case No. 43095, John J. Gardner II, Petitioner, Winchester Vezie (sic), named in the petition, purchased this land back in 1874 at which time he was listed as being a resident of Boston. As far as I know and can find out here, nobody ever heard of him and he has no Nantucket connections.
>
> I checked with the Assessors and I am advised by them that in going back in their records to around 1900, this property hasn't been on the tax rolls since before 1900 until 1964 when they re-assessed it to [illegible] as the last owner of record. There's been considerable [illegible] in the

property since Vezie's day and I would say that it was just about impossible to find this fellow's heirs after a lapse of almost 100 years, particularly when he was no one connected with the Island.

I trust the above will enable you to have decree entered in this case.

12. Mr. Sanguinetti's hope was fulfilled, and a final decree was entered on April 4, 1967 in said tax lien case.

13. As appears from the abstract in Registration Case No. 35851 which was introduced as an exhibit Gardner then conveyed the property to Roy E. Sanguinetti, Trustee under Agreement of Trust dated March 1, 1962 by deed dated May 10, 1967 and recorded in Book 130, Page 456. Later in the same month of May by deed dated May 31, 1967 and recorded in Book 130, Page 568, Sanguinetti conveyed the property to Beinecke for a stated consideration of $16,500.

14. Upon the appointment of William I. Randall as Chief Judge of the Land Court the problem of the John Doe assessments in Nantucket again was raised by the Land Court. District Attorney Philip A. Rollins instituted an investigation in the fall of 1972. The grand jury returned no indictments, but it did report as follows:

REPORT OF THE GRAND JURY SEPTEMBER TERM, 1972

During this term the Honorable Philip A. Rollins, District Attorney for the Southern District of Massachusetts, pursuant to complaints received by him presented to this Grand Jury evidence that a large number of parcels of land have been assessed to a fictitious person, "John Doe."

That such an assessment is probably illegal.

That the tax laws are very complex and difficult to understand for laypeople and some officials.

That an ignorant mistake of the law was in large measure the cause for the assessment of tax liens acquired by the Town of "John Doe" property.

That the exercise of the Town Treasurer's power to assign tax titles to individuals may be subject to abuse throughout Massachusetts and we encourage the efforts of the District Attorney to amend the General Laws to remove this power of all Town Treasurers to assign tax titles without publication and public auction.

That the assessmant practice of "John Doe" should be immediately stopped.

That the District Attorney proceed immediately in the following cases pending in the Land Court to have the assignments determined to be null and void and obtain back for the Inhabitants of Nantucket such parcels of land...

(The list of then pending Land Court Tax Lien cases is omitted.)

15. The District Attorney subsequently wrote to the Nantucket Selectmen and expressed his opinion that in instances where the Land Court had entered a final decree in a tax lien proceeding no recourse was available to the town (which was the situation in the Beinecke transaction), but he suggested that appearances be filed on behalf of the town in all the pending John Doe cases which in his opinion were illegal. He earlier had filed appearances in many, if not all, of these cases, and he recommended that this be done on behalf of the Town. The Town in fact did follow through by filing appearances, and Charles A. Goglia, Jr., Town Counsel who succeeded Mr. Sanguinetti in 1970, appeared in these proceedings. In the Spring of 1973 Mr. Goglia also wrote the Selectmen at length on the history of assessment practices and the controversy surrounding them. The Town did not, however, attack the "John Doe" procedure nor did it pursue possible lines of defense in the pending cases.

16. At approximately this time the case of *Hardy* v. *Jaeckle* was heard by the Land Court, but the multitudinous evidence which was furnished to the Court in the present case

was not before it in the *Hardy* matter. No person opposing the allowance of the petition other than one witness who withdrew during the proceedings took an active part in the trial. After the decision by this Court in the *Hardy* case, District Attorney Rollins delivered to the Nantucket Selectmen a brief case replete with papers relative to the grand jury investigation into Nantucket practices. The Selectmen delivered this brief case to town counsel, but it appears that until the recent hearing in the present case no inventory was made of its contents.

17. In 1969 the Land Court gave notice to the Town Counsel of the petition by Beinecke to register his title to locus, wherein Sanguinetti was requested to file an answer on behalf of the Town to preserve certain rights of way claimed in the area of Reedy Pond; Sanguinetti advised the Selectmen of his inability to act for the Town since he had sold a portion of the land to Beinecke. The Selectmen then requested James K. Glidden, a local attorney well versed in real estate matters, to act on behalf of the Town in the registration proceedings. Subsequently, Mr. Goglia and much more recently the Town's counsel in the present case also filed appearances on its behalf. In the abstract filed in said case on February 5, 1969 appeared the entire title picture of which the Town now complains.

18. Even if we assume, as I have, that the Selectmen are not bound by constructive knowledge of the provisions of the Land Court abstract, it is clear from other evidence that they were aware of the purchase of the tax title assignment by Gardner and the conveyance to Sanguinetti no later than April of 1972.

The account which I have set forth above of general Nantucket tax title procedure with particular emphasis on the present locus makes it very apparent that the Selectmen knew, or should have known, well before the crucial date here (June 23, 1976) that Messrs. Gardner and Sanguinetti may have acted in a fashion inimical to the Town's interest. However, all the evidence compels the conclusion that the Selectmen in the

exercise of their discretion determined that it was preferable to discontinue the practice of the assignment of tax titles, which discontinuance also had been voted by the town meeting, and subsequently was mandated by the General Court, rather than to follow a procedure which would attempt to reverse the status quo and rescind tax title assignments. This may well have been the most sensible approach for the Town to take. The then chairman of the Board of Selectmen pointed out to the District Attorney by letter dated February 1, 1973 that he previously had advised the Board that the chance of success was about 30-40 per cent; the Board also was puzzled as to procedural steps to be followed in light of the assignments the Town had made. In addition, the District Attorney was of the opinion that there was no recourse to the Town in cases where the equity of redemption had been foreclosed, and the Selectmen were aware of this as he had so advised them.

The matter was raised again when the Land Court determined in Registration Case No. 35851 that the Town should be notified of Judge Knight's language in the Probate Court decision considered at length in *Sanguinetti* v. *Nantucket Construction Co.*, Mass. App. Ct. (1977).[6] This case ultimately followed. The registration case is still pending before the Court and may itself be subject to future litigation. Obviously, there are questions which now exist in relationship to the title which will have to be explored ultimately by this Court. So far as the question of whether the present complaint pursuant to G. L. c. 268 is time barred is concerned, only an affirmative answer seems possible. The Town has argued that the facts which it has alleged relative to Winchester Veazie are facts only recently uncovered. I agree that the point has not been raised before although the information was there in the Registry of Deeds to be found and was itself constructive notice to all the world. It seems to me, however, that this approach is

[6] Mass. App. Ct. Adv. Sh. (1977) 404.

begging the question of the status of the ownership of the land, for whether it was in fact owned by Winchester Veazie or by several grantees from him the assessing procedures in Nantucket in this case were no different in kind than the John Doe assessment. It may well be impossible in view of the lapse of time to ferret out the parties now entitled under Veazie's grantees. The real cause for the Town's complaint[7] is not the false information supplied by the assessor, later the petitioner in the tax lien case, and not corrected, indeed accepted, by the Examiner who reported to the Court in the tax lien proceeding. The basic cause for complaint is the history of real estate assessments in Nantucket during the decade of the sixties and the method of disposition of tax titles. This culminated in the grand jury investigation and the recommendations of the District Attorney. The Selectmen again and again were put on notice of facts, which if they had pursued them, easily would have led to a full disclosure of the facts on which this camplaint is based. The conclusion is inescapable that the Selectmen not only were aware of the general problem but also knew, or should have known of the roles played by Gardner and Sanguinetti in the Reedy Pond transaction and chose knowingly under all the circumstances not to pursue the investigation. Instead, adopting the concept that "You cannot go home again" the Town heretofore has electd to change future procedure but not to undo the past. It is too late now to reverse this decision.

Judgment accordingly.

s/ MARILYN M. SULLIVAN
Justice

Dated: March 26, 1981

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[7] This is not to say that the Court itself is not both grieved and aggrieved at the abuse of judicial foreclosure of tax titles and of the trust reposed by it in officers of the Court.

SECOND AMENDED COMPLAINT (EXCERPTS)

* * *

49. No notice of the Registration Case was given to the owners of the various lots of the locus. (p. 10)

* * *

RELIEF REQUESTED

WHEREFORE, the plaintiffs demand judgment as follows:

* * *

7. That the Court review the registration decree of December 9, 1981 and enter a declaration that such decree is void and without force and effect. (pp. 15, 16)

* * *

OPENING STATEMENT OF PLAINTIFFS (EXCERPT)

* * *

They [plaintiffs] are here present in the Court, and they are here seeking to have their interest in the land confirmed by this Court in an Order which would hold that the land was wrongfully taken from them in the original tax lien foreclosure case and in the registration case, in that, they were not given notice or an opportunity to be heard regarding the two proceedings which have deprived them of their interest in this land. (Tr. Vol. I, p. 16)

* * *

ARGUMENT DURING TRIAL (DAY 14) (EXCERPT)

The Court: What notice?

Mr. Pirozzolo: Notice to the Plaintiffs.

In all of—in both the tax lien foreclosure case and in the registration case notice was given to Winchester Veazie. Therefore, even under the statutory requirements, the statutory minimum requirements of notice, both in assessing the land, and the tax land foreclosure proceeding and in the registration case, notice has to be given to the true owners. Giving notice to Winchester Veazie, who is not the true

owner, is no notice at all; even though it was published in January or February down in Nantucket.

It does not—that notice does no meet the statutory requirements or the requirements of Hardy v. Jaeckle; and it does not meet the minimal—the minimal standards. In addition to that, it certainly does not meet the Constitutional requirements of Mullane—the Mullane case, the Mennonite Board of Missions case, and U.S. v. 125.2 Acres of Land. U.S. v. 125 Acres of Land is at 732 Fed. 2nd, 239; and Mullane is 70 Supreme Court 652; and Mennonite Board of Missions is 103 Supreme Court 2706.

In each of those cases the Supreme Court says that in order—I'm sorry. In each of the Supreme Court cases—and then followed in U.S. v. 125.2 Acres of Land, the Court says that in order to meet or pass Constitutional muster, notice must be designed or be reasonably calculated to reach the parties who have an interest. And certainly publishing a notice to a Winchester Veazie in a newspaper in Nantucket, when the true owners are other persons, when the true owners are very well not likely to be on Nantucket is not notice that meets the Constitutional requirements. There was no reasonable diligence, as is required by those cases, in giving notice in such a manner as to be reasonably calculated to reach those who would have had an interest, and who would have come in, or would have had an opportunity to come in to protect their interests, when they were being ousted of their rights in the land. (Tr. Vol. XIV, pp. 25-26)

* * *

PLAINTIFFS' PROPOSED FINDINGS OF FACT (EXCERPT)

* * *

. . .

122. In the Registration Case plaintiffs and/or their predecessors in interest were deprived of their property without notice or a hearing. (p. 22)

* * *

PLAINTIFFS' TRIAL BRIEF (EXCERPTS)

* * *

A. Actual or Constructive Fraud Was Committed in the Registration Case, and a Constructive Trust Should Be Imposed on the Locus, or the Registration Decree Should Be Annulled

There can be no dispute that the information set forth in the petition to register title to Share 10 was materially false when made and that no notice of the petition was given to the numerous record holders of portions of Share 10. (pp. 21-22)

* * *

J. The Actions of Defendants Deprived Plaintiffs of Property Without Due Process of Law

Plaintiffs also contend that the actions of defendants caused them to be deprived of their property witout due process of law. The only notice of any sort was a notice for the Tax Lien Foreclosure Action directed to Mr. Veazie, published in the *Nantucket Inquirier and Mirror.* Plaintiffs and their predecessors in title received no other notice. They were not named in the notice and no other notice was directed to them. As such, they never were informed nor had any notice of any sort that their property was being taken. Defendants used proceedings in this court to obtain decrees which purported to extinguish plaintiffs' rights in the Locus, knowing that plaintiffs' interests had not been brought to the attention of this Court.

The actions of defendants constituted a clear deprivation of due process of plaintiffs, in violation of the Fourteenth Amendment to the United States Constitution and Articles X

and XI of the Declaration of Rights of the Commonwealth. Thus, in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court dealt with a pooling of trust funds into common trusts by a bank trustee, where the only notice to the beneficiaries was a notice published in a newspaper which merely listed the trusts, and not the beneficiaries. 339 U.S. at 310. The court noted the interest of the state in bringing issues to a final settlement, which if then balanced against the rights of the individual beneficiaries, who could be damaged by a possible loss of rights against the trustees. Id. at 313-14.

In *Mullane* the court stated that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315. Looking at a notice which was "in small type inserted in the back page of a newspaper" for individuals whose listed addresses were "outside the area of the newspaper's normal circulation" and where the names of the individuals in question are not listed, the Court concluded: "In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint." *Id.* Accordingly, the Court concluded that where the whereabouts of persons are known, service by publication is insufficient. *Id.* at 320.

More recently, in *Mennonite Board of Missions* v. *Adams*, 103 S.Ct. 2706 (1983) the Court held that the taking of land for non payment of taxes without notice to the mortgagee violated the mortgagee's due process rights by extinguishing the mortgagee's interest without notice.

This case presents the same situation as *Mullane* and *Mennonite*. As in *Mullane*, the actual owners of the interest were not listed. Notice to Winchester Veazie is not notice to Russell Conwell, Ellen Gould, Rufus Johnson, Andre Woodbury or their heirs. From the deeds alone, the cities or towns of residence of the owners were known. In this instance, the published notice plainly was inadequate. (pp. 79-81)

• • •

PLAINTIFFS' POST TRIAL BRIEF (EXCERPTS)

I. *INTRODUCTION*

Plaintiffs' claims, born out of an infamous series of acts of self-dealing, fraud and deception by public officials and those closely associated with them in a scheme to deprive plaintiffs of their land, have been proven. The land in question was improperly assessed, improperly taken and improperly assigned. The tax lien foreclosure was obtained through the use of a title report which was fraudulent. The decree of registration was based upon this tax lien foreclosure, by persons who actively or constructively knew of undisclosed record interests in the Locus. The decree of registration was based upon such nondisclosure. Plaintiffs, the descendants of the last record owners of more than half of the property, have been wrongfully deprived of their property without notice or the opportunity to be heard. The perpetrators have been caught red handed in an effort to purloin that which is not theirs. (p. 1)

• • •

C. Plaintiffs are not barred by *res judicata* because they did not receive proper notice and therefore there is no valid judgment against them

The decree in the Registration Case has no *res judicata* effect against plaintiffs because they and their predecessors in interest failed to receive the written notice to which they were entitled under G.L. c. 185, § 39, as persons claiming interests in the Locus. Failure te receive such notice rendered the Decree invalid against them.

In *State Street Bank & Trust Co.* v. *Beale, supra*, the court held that the plaintiffs, who failed to receive notice of registration proceedings because of fraud by the petitioner were entitled to recover their land, even though this Court had entered a decree of registration more than one year prior to when plaintiffs filed their complaint. Similarly, in *Kozdras* v.

Land/Vest Properties, Inc., *supra*, the court permitted plaintiffs to challenge a registration decree obtained by fraud, even though suit was commenced two years after entry of a registration decree, and plaintiffs had received notice of the registration proceeding as abutters, but that notice did not indicate that they claimed ownership interest in portions of the land to be registered. Consequently, they filed no appearance on the advice of counsel.

Although these cases did not state directly that lack of proper notice negates a *res judicata* defense, the implication of these decisions mandates such a result. Absent the notice required by G.L. c. 185, § 39, there is no identity of parties. Such a result is consistent with the analogous "tax taking" cases discussed *supra*, which held that failure to notify those persons entitled to notice by mail in a proper manner rendered any judgment invalid and ineffective as against those persons. *See e.g.*, *Land Builders*, *supra*.

In light of *State St. Bank* and *Kozdras*, those plaintiffs who had no notice or knowledge of the Registration Case are not bound by the Decree. *Cf.*, *Lyon* v. *Parkinson*, 330 Mass 374, 377 (1953), which suggests by implication that without notice and an opportunity to be heard, an abutter to, or other person claiming an interest in a registration proceeding could challenge the decree. *See also*, *Studley* v. *Kip*, 245 Mass. 243 (1923). (pp. 122-124)

OBJECTIONS TO FINDINGS AND MOTION TO AMEND FINDINGS (EXCERPTS)

* * *

30. That the Findings, Rulings and Decision, be amended by adding to it the following findings from Plaintiffs' Proposed Finding of Fact, previously filed with this Court: Nos. . . . 122 [In the Registration Case plaintiffs and/or their predecessors in interest were deprived of their property without notice or a hearing.] (p. 11)

* * *

6. [T]hat the decrees of this Court in the proceedings for the foreclosure of the tax lien on the Locus (T.L. No. 43095) and the proceedings for registration of title to the Locus (Reg. No. 35851) deprived plaintiffs and other owners of interests in portions of the Locus of their property without due process of law due to the fraudulent actions of defendant Mooney, which infected all subsequent proceedings;

7. [T]hat as the taking of the interests of plaintiffs in portions of the Locus was without due process of law, the subsequent decrees of this Court regarding the Locus are null and void as to them;

8. [T]hat prior decisions regarding the actions to be taken to provide proper notice, particularly *Hardy* v. *Jaeckle*, 371 Mass. 573 (1976), are unconstitutional and insufficient in the light of *Mennonite Board of Missions* v. *Adams*, 103 S.Ct. 2706 (1983); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *United States* v. *125.5 Acres of Land*, 732 F.2d 239 (1st Cir. 1984) and, notice, as constitutionally required was not given.

• • •

REQUEST FOR DIRECT APPELLATE REVIEW (EXCERPTS)

Plaintiff, appellant, William J. Devine, hereby requests, pursuant to Mass. R. App. P. 11, direct appellate review by the Supreme Judicial Court of this appeal from a judgment of the Land Court vitiating substantial interests in valuable real property on Nantucket on the ground that this appeal raises issues pertaining to the stifling of constitutionally protected speech as champerty, the confiscation of property through tax takings, tax lien foreclosure proceedings and registration proceedings without notice and an opportunity to be heard, ... and, more particularly:

1) the unconstitutionality of tax takings, tax lien foreclosures and subsequent registration in light of cases such as *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); and *United States* v. *125.2 Acres of Land*, 732 F.2d 239 (1st Cir. 1984); (pp. 1-2)

• • •

This appeal presents the following issues:

• • •

7. Whether the Constitution of the United States, the Massachusetts Constitution, the principles disclosed in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *United States* v. *125.2 Acres of Land*, 732 F.2d 239 (1st Cir. 1984), *In the Matter of Amendment to S.J.C. Rule 3:07*, 398 Mass. 73 (1986), *Lynnfield* v. *Owners Unknown*, 397 Mass. 470 (1986), and *Hardy* v. *Jaeckle*, 371 Mass. 573 (1976), preclude a taking for non-payment of taxes, subsequent tax lien foreclosure and registration of the land where:

a) notice was given to a predecessor in record title who had conveyed away his interests, and not to the record owners; and

b) in any event, notice was inadequate.

APPELLANT'S BRIEF (EXCERPT)

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues:

1. Whether the Constitution of the United States, the Massachusetts Constitution, and the principles disclosed in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), United States v. *125.2 Acres of Land*, 732 F.2d 239 (1st Cir. 1984), *In the Matter of Amendment to S.J.C. Rule 3:07, DR 2-103 and DR 2-104*, 398 Mass. 73 (1986), *Lynnfield* v. *Owners Unknown*, 397 Mass. 470 (1986), and *Hardy* v. *Jaeckle*, 371 Mass. 573 (1976), preclude a taking of land for non-payment of taxes, subsequent tax lien foreclosure and registration of land where:

a) the assessment was made and notice was given, not to the record owners, but to a predecessor in record title who had conveyed away his interests; and

b) in any event, notice was a mere gesture neither reasonably calculated to reach the persons to whom notice was due nor provided by the best means reasonably available.

. . .

(p. 1)

APPELLANT'S REPLY BRIEF (EXCERPTS)

In *Lancaster* v. *Foley*, 15 Mass. App. Ct. 967, *further appellate review denied*, 389 Mass. 1103 (1983), the Land Court, affirmed by the Appeals Court, denied a routine motion to answer late by heirs who had not received notice, *contrast Lynnfield* v. *Owners Unknown*, 397 Mass. 470, 472 (1986), and based its decision upon "the circumstances by which Beuttel was apprised of his interest" (I:265)), 15 Mass. App. Ct. at 969-70.

Devine v. *Nantucket*, 16 Mass. App. Ct. 548, *further appellate review denied*, 390 Mass. 1103 (1983), abolished the right of redemption of parties whose land had been taken and kept by a town under prior statutory schemes in conflict with the policy of *Lynnfield*, *supra*, that redemption is favored and that "the only legitimate interest of a town in seeking to foreclose redemption is the collection of the taxes due . . ." 397 Mass. at 474.

Hilde v. *Dixon*, 16 Mass. App. Ct. 981, *further appellate review denied*, 390 Mass. 1104 (1983), held that it was neither "substantial" nor "misleading" to send tax bills to a deceased person even though the probate records of that county showed the correct name and address of the administrator. The Appeals Court assessed $1000 in attorneys' fees, a penalty subsequently removed in the light of *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983).

Allen v. *Batchelder*, 17 Mass. App. Ct. 453, *further appellate review denied*, 391 Mass. 1104 (1984), was the first case in this Commonwealth to find adverse possession against a co-tenant in common without evidence of an affirmative act of ouster. The Appeals Court again assessed attorneys fees against Mr. Devine, this time in the amount of $5,000, accompanied by a sua sponte consideration of champerty, without an opportunity for the parties to brief or argue the issue. 17 Mass. App. Ct. at 459-60.

Krueger v. *Devine*, 18 Mass. App. Ct. 397, *further appellate review denied*, 393 Mass. 1102 (1984), held assessments of "land at So. Beach Tract 39 acres" and "58 lots at So. Beach Tract 6 acres 37,771 feet" not to be substantially misleading or flawed, even though the evidence showed that the assessed owner owned other, similar tracts in the area on which taxes were paid, and more precise descriptions existed.

Robertson v. *Plymouth*, 18 Mass. App. Ct. 592, *further appellate reviw denied*, 393 Mass. 1104 (1984), began with another personal attack on Mr. Devine and held that the failure of assessors to comply with the requirements of *Hardy* v. *Jaeckle*, 371 Mass. 573 (1976) did not render the assessment or taking invalid. (p. 1, n. 1)

Supreme Court, U.S.
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No. 87-1123

In the Supreme Court of the United States

OCTOBER TERM, 1987

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, GEORGE STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, G. THEODORE MASCOTT, JR., ESTATE OF ROBERT CLEAVES, PATRICIA GOULD ANGLIN, AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART AND MELBA W. NORVELL,

APPELLANTS,

v.

E. GARRETT BEWKES,

APPELLEE.

On Appeal From the Supreme Judicial Court of Massachusetts

APPELLEE'S MOTION TO DISMISS

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APPELLANTS,

v.

E. GARRETT BEWKES,

APPELLEE.

On Appeal From the Supreme Judicial Court of Massachusetts

MOTION TO DISMISS

The appellee, E. Garrett Bewkes, hereby moves that this Court enter an order dismissing the instant appeal. As grounds therefor, the appellee states that this Court is without jurisdiction over this matter, because the appellants did not raise before the Massachusetts courts the Constitutional issue which they now seek to present. The Supreme Judicial Court of Massachusetts determined the case exclusively on the basis of the application of state law to the claims pleaded by the plaintiffs. No question of conflict between the land registration statute and the Due Process Clause of the Fourteenth Amendment was considered or decided. In further support hereof, the appellee offers the following facts, points and authorities.

Statement of Relevant Procedural Facts

In their jurisdictional statement, the appellants accuse the Supreme Judicial Court of Massachusetts of "indulging in the transparent fiction that plaintiffs/appellants had never raised the issue of due process" in the state court proceedings. (J.S. 10).[1] Review of the pleadings and briefs filed previously in this matter establishes clearly, however, that the appellants' accusation is unfounded. It is unassailably apparent upon the record in this case that the appellants conjured up their belated attack upon the statute which accords finality to registration decrees only after they failed to establish their right to relief under either that statute or the other theories pleaded in their complaint.

The appellants claim to be the successors in interest of persons who, in the mid-1870's, bought lots of land in a Nantucket subdivision which never came into being.[2] The isolated land has never been occupied or used by anyone. Prior to the disputed tax takings, sales and court proceedings, it does not appear that anyone expressed any interest in the land. In 1963, when the property was taken for nonpayment of taxes, no official records existed within Nantucket County, either in the Registry of Deeds, or in the Registry of Probate, from which it could be determined who, if anyone, claimed to be the present owner, by inheritance or otherwise, of the property.

---

[1] References to the Jurisdictional Statement filed by the appellants are cited as (J.S. __). References to documents in the Appendix to the Jurisdictional Statement are cited as (J.S.A. __). References to the appendix included herein are cited as (A. __).

[2] It is noteworthy that, although the appellants appear in this court as a group, there is no identity or unity between the ownership rights which they respectively claim. Indeed, appellants Quinlan and Norvell are the only persons among the group who were successful in convincing the Land Court that they, in fact, would enjoy interests in the locus were it not for the intervention of the tax taking, foreclosure, and registration proceedings. (J.S.A. 43-44, 54-55). All of the remaining plaintiffs were held, for various reasons, to lack standing to make any claims to ownership of the premises. (*Id.*).

The locus was taken for nonpayment of taxes in 1963 and, four years later, the Land Court foreclosed the rights of any and all persons claiming to be the owners to redeem the land by payment of past due taxes. The registration proceedings commenced in 1968, but it was not until 13 years later, after Mr. Bewkes had purchased the property for value, that title was confirmed.

While proceedings which eventually led to registration were ongoing, appellant Devine, who makes a business of seeking out potentially troubled titles and instituting litigation to gain possession of land, became interested in the parcel which Mr. Bewkes had purchased. (J.S.A. 38). In July of 1981, five months before the decree of registration entered, Devine had already entered into agreement with Quinlan, had a deed purportedly giving him one half of Quinlan's purported interest, and had signed an agreement giving him total control over litigation which was to be used to promote the joint venture of recovering the Quinlan interest, and developing the land thereafter. (J.S.A. 38-39). Before the decree entered, Devine had enlisted in the scheme seven of the original plaintiffs, and was entitled to name them as plaintiffs in litigation which he would control.

Devine knew that the registration case was proceeding to judgment. He chose, however, to make no attempt to appear or intervene in the registration proceedings, and allowed a final decree to enter, and the period for appeal to pass, without making his claims or the claims of his co-venturers known to the Land Court.

Whatever their reasons, the appellants allowed the decree to enter, and the appeal period to run, and then instituted a collateral attack upon Bewkes' confirmed title in the Superior Court of Massachusetts. Neither the original complaint nor the amended and second amended complaints by which it was followed set forth any challenge to the constitutionality of the registration statutes, on any grounds. See A. 3-15.

There is not a single reference, in any of the three versions of the complaint, to the United States Constitution, the Massachusetts Constitution, due process of law, or the invalidity of General Laws Chapter 185 §45. Although Massachusetts courts are vested with the authority to declare the validity of statutes, no claim for such relief was ever presented. See G.L. c. 231A. The appellants never complied with the provisions of Rule 24(d) of the Massachusetts Rules of Civil Procedure which requires any party who seeks the declaration of the invalidity of a statute to give notice to the Attorney General in sufficient time as to allow the Commonwealth the opportunity to intervene in the action in order to protect its own interests.

The Second Amended Complaint upon which the trial proceeded contained four counts, two of which were premised on the allegation that Bewkes was chargeable with both the purported fraud of his predecessors in interest and the supposed wrongdoing of Robert Mooney, an attorney with whom he had no relationship. There was a count for the imposition upon Bewkes of a constructive trust, which would have left the registration decree intact. (A. 8-12). Two counts sought money damages from Mooney. (A. 12-13). The final count sought relief under the provisions of G.L. c. 185 §45 which allow relief from judgment where a registrant has worked a fraud upon the Land Court. (A. 13). The constitutionality of that statute was not challenged, even inferentially.

It was upon these pleadings, and the theories asserted therein, that the case was tried. At no time have the appellants sought leave to amend their complaint to set forth a specific claim that the registration statute is unconstitutional.[3] Nor can it

[3] It is noteworthy that the plaintiffs *did* move to amend their complaint during trial, but the amendment was entirely unrelated to the issue which they now seek to present. Realizing that they were not going to be able to prove any basis for recovery against Mooney on a fraud theory, they sought to amend their complaint so as to set forth a claim for negligence. (J.S.A. 16).

be said that the issue was tried by consent of the parties. The trial judge certainly did not perceive that any constitutional claim was raised by the pleadings or trial, as evidenced by the absence of any discussion of a constitutional issue in a 44-page opinion setting forth his findings and rulings. (J.S.A. 14-55).

On appeal to the Supreme Judicial Court (the "SJC"), the appellants fared no better with their belatedly-raised due process challenge. The SJC stated explicitly in its opinion that the plaintiffs had not challenged, on due process grounds, the absence of notice to them of the registration proceeding. (J.S.A. 10, n.11). The SJC affirmed the judgment in favor of Bewkes exclusively on the basis of the appellants' failure to prove their right to recovery under the fraud theories which they had properly advanced. (J.S.A. 11).

Argument

I. THIS COURT IS WITHOUT JURISDICTION OVER THE INSTANT APPEAL, BECAUSE THE APPELLANTS FAILED TO TIMELY RAISE BEFORE THE MASSACHUSETTS COURTS THE ISSUE OF THE CONSTITUTIONALITY OF THE MASSACHUSETTS LAND REGISTRATION SYSTEM WHICH PROVIDES ABSOLUTE FINALITY TO A DECREE OF REGISTRATION ISSUED BY THE LAND COURT.

A. *The Jurisdictional Prerequisites*

The appellants claim that this Court has jurisdiction over the instant appeal pursuant to the provisions of 28 U.S.C. §1257(2), governing direct appeals from the courts of the states. In relevant part, the statute provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity."

The plain language of the statute indicates that there are two requirements which must be satisfied conjunctively in order to confer jurisdiction upon this Court. The appellant must have raised the issue of repugnancy in the state courts in accordance with the applicable procedural requirements. *Board of Directors of Rotary International* v. *Rotary Club*, 481 U.S. __, 95 L.Ed.2d 474, 487, 107 S.Ct. 1940 (1987); *Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978). In addition, the appellant must demonstrate that the state courts have considered the federal question, and have made a decision in favor of the validity of the statute. 28 U.S.C. §1257(2); *cf. Durley* v. *Mayo*, 351 U.S. 277, 281 (1955), *reh. den.* 352 U.S. 859 (1956).

Determination of whether the first requirement has been satisfied necessitates a review of procedural history. The appellant is required to demonstrate that it has presented the constitutional question to the state courts, in accordance with state procedural requirements.

> It is well settled that this Court will not review a final judgment of a State unless the 'record as a whole shows either expressly or by a clear implication that the federal claim was adequately presented in the state system.' *Webb* v. *Webb*, 451 U.S. 493, 496-497.

Board of Directors of Rotary International v. *Rotary Club*, *supra*, 95 L.Ed.2d at 487.

Although no particular form of words is required to raise a federal question, this Court has made clear that appellants are expected to have raised specific challenges, based upon identified portions of the United States Constitution, in appropriate pleadings and at appropriate times in the proceedings.

> This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice.

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Atlantic Coast Line R.R. v. *Mims*, 242 U.S. 532, 535 (1917). A purported constitutional question, raised as an "afterthought" on appeal or rehearing will not be considered by this Court.

> The long-established general rule is that the attempt to raise a federal question, after judgment, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it.

Herndon v. *Georgia*, 295 U.S. 441, 443 (1935).

Determination of whether the state court has passed upon the federal question, and upheld the validity of the state statute, is determined by review of the state court opinion at issue. *Webb* v. *Webb*, 451 U.S. 493, 495 (1981). When it is unclear whether a federal question has been decided, resort will be made to the rule that it will be assumed that an omission to decide such a question was due to want of proper presentation in the state courts, at least until the aggrieved party can affirmatively show to the contrary. *Webb* v. *Webb*, 451 U.S. 493, 495 (1981); *Street* v. *New York*, 394 U.S. 576, 582 (1969).

Where the state court has determined expressly that an appellant has failed to preserve or present properly an issue of constitutional magnitude, such a determination is entitled to great deference by this Court, and will ordinarily not be reviewed.

> When, as here, there can be no pretense that the [state] court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong. *Nickel* v. *Cole*, 256 U.S. 222, 225, 65 L.Ed.2d 900, 905, 41 S.Ct. 467.

Wolfe v. *North Carolina*, 364 U.S. 177, 195 (1960).

> [U]pon the question of whether or not such a claim has been asserted, the decision of the state court is binding on this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. (Citations omitted)

Atlantic Coast Line R.R. v. *Mims, supra*, 242 U.S. at 535.

B. *The Claim That the Land Registration System Is Unconstitutional Was Not Timely Raised in the State Courts.*

The claim by the appellants, that they have "done everything in their power repeatedly to put their due process claims before the Massachusetts courts at every stage in these proceedings" is nothing more than wishful thinking. (J.S. 3). Although they cite their Second Amended Complaint as the first instance in which they raised their claim that the finality of the registration process violates their rights to due process, it is clear, upon examination of that document, that no such claim was encompassed therein. (A. 3-15).

Neither the allegation that they had no notice of proceedings affecting the locus nor their request that the registration be declared void can be construed as setting forth a challenge to the constitutionality of the registration statute. *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648 (1897). This is particularly the case where, as here, the allegation and prayer for relief were inextricably bound in a theory of recovery based exclusively on the purported fraud and wrongdoing of named individuals.

The *Oxley Stave* case, decided under an earlier, but analogous, version of the jurisdictional statute here at issue, is precisely in point. There, as here, the plaintiffs asserted in the state court complaint that judgments operating against them were void for lack of notice and fraud upon the issuing court. On appeal to this Court from an adverse decision of the

Supreme Court of Missouri, it was held that such general allegations did not raise federal questions for decision by the state courts and that consequently jurisdiction for appeal to this Court would not lie. 166 U.S. at 660.

The plaintiffs deliberately chose to rely exclusively on the theory that Mr. Bewkes either participated in, or was chargeable with, a fraud upon the Land Court in the procurement of the registration of title to locus. Plaintiffs did not challenge the validity of G.L. c. 185 §45. On the contrary, it was pursuant to that statute that they sought to have the judgment of registration set aside. Neither their request for relief under the statute, nor their request for the imposition of a constructive trust, a common law remedy for fraud, provided the Land Court with any notice of a claim that the finality of registration decrees may be violative of rights protected by the United States Constitution.

Appellants would now like to ignore the limitations of their own pleadings, preferring to rely for jurisdictional purposes upon their oral assertion during an argument at trial that due process concerns were at issue in the case. For a variety of reasons, their reliance is obviously misplaced.

The trial judge was certainly entitled, as a matter of Massachusetts law, to ignore an argument which went beyond the scope of the pleadings, and for which a procedural predicate was otherwise lacking. *Tompkins* v. *Sullivan*, 313 Mass. 459, 461-463 (1943); *Seder* v. *Kozlowski*, 304 Mass. 367, 369-370 (1939). The Land Court was required to decline to entertain the issue where the appellants deprived the Commonwealth of the opportunity to protect its interest in upholding the statute. The courts of Massachusetts have held quite consistently that the failure to notify the Attorney General of such a challenge, in such time as to allow that officer to fully litigate the question, bars the plaintiff from relief on that ground. *Karchmar* v. *City of Worcester*, 364 Mass. 124, 135 (1973); *Gamache* v. *Acushnet*, 14 Mass. App.

Ct. 215 (1982). Not only did the appellants fail to comply with the dictates of Mass. R. Civ. P. 24(d), they actually *resisted* an attempt by Bewkes to add the Commonwealth as a party.[4] Having done so, they foreclosed completely any opportunity for appropriate litigation of the issue which they later sought to raise.

Moreover, it is clear that the due process issue about which appellants' counsel spoke at trial and wrote in trial briefs was a different issue than that which they now press upon this Court. In their pre-trial brief, appellants claimed that the defendants deprived them of due process of law by failing to cause the issuance to them of a notice of the tax lien foreclosure case. (J.S.A. 78-79). In their post-trial brief, their focus changed, and they argued that Bewkes was not entitled to any protection by way of the registration decree because he failed to comply with G.L. c. 185 §39, which requires the issuance of a notice to persons claiming interests in a locus to be registered. (J.S.A. 80-81). The portion of this brief which is reproduced in the appendix to the Jurisdictional Statement does not even mention the Constitution.

The other reference upon which the appellants rely, an oral argument during the trial in the course of which the Constitution was mentioned, can hardly be read as a statement of the issue which is here presented. (J.S.A. 76-77). The complaint of appellants' counsel about the adequacy of a notice "published in January or February down in Nantucket" (J.S.A. 77) was obviously directed at the notice of the tax lien foreclosure case which appeared in the *Nantucket Inquirer and Mirror* on February 2, 1967. His reference to "*Hardy* v. *Jaeckle*" (J.S.A. 77) was likewise directed specifically to tax taking procedures which are the subject of that case and not to the registration statutes. See *Hardy* v. *Jaeckle*, 371 Mass. 573 (1976).

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[4] Bewkes moved to join the Commonwealth as a party, on the basis, *inter alia*, that the outcome of the case would affect a privilege granted by the state, indefeasible registration. The Commonwealth supported the motion, but the appellants opposed the joinder. (A. 16-21).

The focus of the argument then advanced was clearly upon the adequacy of tax taking procedures. No amount of creative editing can transform these arguments into the sweeping attack upon the finality of registration procedures which the appellants now seek to present to this Court.

The appellants also claim that they raised before the Supreme Judicial Court the question set forth in the Jurisdictional Statement. In support of this assertion, they cite passages from the summary statements of issues which were included in briefs filed in the Supreme Judicial Court. (J.S.A. 76-84). Notably, the relevant text of these briefs is not contained within the appendix.

This aspect of their argument reflects, once again, wishful thinking. Reference to the text of the briefs before the Supreme Judicial Court demonstrates aptly that the due process issue there presented was markedly different from that which is now urged before this Court. Moreover, the content of the briefs before the SJC is simply irrelevant where, as here, controlling state law foreclosed reliance at the appellate level upon arguments and grounds not advanced previously.

Relevant sections of the appellants' Brief and Reply Brief have been reproduced in full in the appendix hereto. (A. 22-34). The following passages establish that, in the SJC, the appellants were preoccupied with questions concerning takings and foreclosures, and that the adequacy of due process protection in registration proceedings was not even mentioned:

> 2. *The Absence of Constitutional Required Notice Deprived Plaintiffs of Due Process of Law.*
>
> "Even if the purported taking of plaintiffs' property were not in violation of Massachusetts statutes and controlling judicial decisions it is plain that the assessment, taking and the Tax Foreclosure Action deprived plaintiffs of property without the due process of law guaranteed by the United States Constitution." (A. 24).

> "The requirements of federal due process thus parallel the existing law of the Commonwealth regarding the validity of tax takings. Improper assessments, lack of notice and failure to comply with the provisions of the tax taking statutes *'strictissimi juris'* all render a tax foreclosure invalid and a nullity." (A. 26).
>
> "Because the notice here did not comply with the constitutional requirements of reasonable effort, even under the relaxed standards of *Hardy* v. *Jaeckle*, it was constitutionally defective and the bar of Section 69A does not apply." (A. 27).[5]

It is worthy of note that there was ample motivation for the appellants to deliberately avoid focusing upon a due process challenge to the registration decree itself. Eight of the appellants, including Mr. Devine, who unilaterally controlled and financed the litigation, were necessarily to be confronted with the fact that they knew, or were charged with knowledge, of the registration case and had chosen deliberately not to enter that action to protect their asserted interests. (J.S.A. 38-39).

Devine, who organized and financed the litigation effort, knew both of the registration case and of the nucleus of facts giving rise to his challenge to the registration more than a year before the judgment of registration entered. Five months before title was registered, he possessed a deed to one-half of appellant Quinlan's claimed interests, and thus had standing to move to intervene. (J.S.A. 39). Seven other appellants also had joined the venture before the registration was decreed. (J.S.A. 39) All of these appellants had the opportunity to litigate title and notice issues within the registration case, and on appeal, if necessary, but chose not to do so. By their

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[5] The references to "*Hardy* v. *Jaeckle*" and to "Section 69A" relate to a case and a statute concerned exclusively with tax taking foreclosures, the statutory reference being directed to a provision which accords finality to foreclosures after the passage of a one-year period. See G.L. c. 60 §69A.

deliberate strategic choices appellants made themselves subject to the limitation upon collateral attack which they now seek to challenge.

The validity of the limitation on collateral attack set forth in G.L. c. 185 §45 was never challenged on due process grounds because Devine had good reason to be doubtful of the likelihood of success of such a challenge, and he controlled the litigation. Only when a deliberately chosen strategy proved to be fatally flawed did the appellants lash out in frustration at the entire system of registration, the Land Court, its judges, and the Bar of the Commonwealth. From this genesis was born the assertion that G.L. c. 185 §45 cannot constitutionally afford finality to registration decrees. The argument was first presented to the SJC in a request for rehearing, filed after that court's opinion was released.[6] Such is not the stuff of which appeals to this Court are made. See *Herndon* v. *Georgia*, *supra*, 295 U.S. at 443.

C. *The Supreme Judicial Court Was Not Required To Consider, and Did Not Consider, the Issue Which the Appellants Now Press Upon This Court.*

This Court need not concern itself unduly, however, with the determination of the magnitude of the difference between what the appellants argued in the Supreme Judicial Court and what they now seek to argue. The content of briefs submitted to the state courts is immaterial if the presentation of the issues set forth in the briefs was foreclosed by failure to comply with applicable procedural requirements. *Michigan* v. *Tyler*, *supra*, 436 U.S. at 512 n.7; *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960).

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[6] Curiously, the appellants did not, in their Jurisdictional Statement, describe this request as a stage in the proceeding at which the issue was raised and the document does not appear in the appendix thereto. See Supreme Court Rule 21(h).

Massachusetts does not afford to litigants the opportunity for plenary review in appellate courts of arguments not within the scope of the pleadings. *Lapointe* v. *Licensing Board of Worcester*, 389 Mass. 454, 457 (1983). The failure to present an issue to the trial court for determination is fatal to an attempt to raise the issue on appeal. This rule is applicable to claims based upon the Constitution. As the Supreme Judicial Court noted in *Axelrod* v. *Board of Assessors of Boxborough*, 392 Mass. 460, 463 n.2 (1984), a claim that a trial court's interpretation of a statute is unconstitutional is of no avail to a litigant if the construction is correct, and the constitutional issue has not been raised at trial.

Massachusetts appellate courts will not entertain on appeal a theory of recovery different from the theory urged below. *Pattelena* v. *Segel*, 346 Mass. 726, 730 (1964); *Marcil* v. *John Deere Industrial Equipment Co.*, 9 Mass. App. Ct. 625, 629 (1980). Moreover, inexcusable delay in the presentation of an issue of constitutional magnitude, which delay results in the failure or inability of the Commonwealth to intervene to protect its interests, has been held to bar consideration of the issue. *Karchmar* v. *City of Worcester*, 364 Mass. 124, 135 (1973). The SJC was not bound, nor did it choose, to entertain a constitutional argument neither encompassed by the pleadings nor raised before the trial court.

In its opinion, in the context of a discussion of the finality of a judgment of registration, the Supreme Judicial Court stated specifically that "the plaintiffs do not challenge on due process grounds the absence of notice to them of the registration proceeding". For obvious reasons, the plaintiffs choose simply to dismiss this determination, patronizingly stating that the Supreme Judicial Court is "to put it most charitably, incorrect" and accusing the Supreme Judicial Court of "indulging in [a] transparent fiction." (J.S. 2, 10).

The appellants, not the SJC, indulge in fiction, and disserve their cause by such cavalier treatment of an appellate deter-

mination which, according to the holdings of this Court, is entitled to great deference. See *Wolfe* v. *North Carolina*, *supra*, 364 U.S. at 195; *Herndon* v. *Georgia*, *supra*, 295 U.S. at 443.

For any number of legitimate reasons, the Supreme Judicial Court was entitled to conclude that no due process issue arising out of the registration had been preserved or presented. See generally *Orr* v. *Orr*, 440 U.S. 268, 274-277 (1979). The issue was not pleaded, it was not tried, and the Land Court had made no findings or conclusions relative thereto. The Attorney General of the Commonwealth had not been notified of the appellants' intent to raise such a challenge. The Land Court judge had made no finding or rulings thereon, even though he had painstakingly resolved in his lengthy opinion the myriad of issues which were properly raised in the case. As this Court stated in *Michigan* v. *Tyler*, *supra*, 436 U.S. at 512 n.7:

> Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule. (Citations omitted).

The factors noted above are not insignificant in determining whether appellate review was, and is, appropriate. The Land Court had received no evidence directed toward due process concerns, and neither that court nor the Supreme Judicial Court had any record upon which to base a balancing of state and municipal interests in the certainty of titles and the efficiency of tax collection procedures against the dormant individual interests in long-forgotten land. There is no evidence in the record relative to the vital question of whether any reasonable effort to give notice, if undertaken, would have changed the result in this case. Assuming that the SJC could perceive from the record that the appellants sought to challenge the rule of finality, it could hardly be expected to determine, in a vacuum, whether that rule is indispensable to the operation of a workable system of registration.

A question of such magnitude, the determination of which could affect the marketability of an incalculable number of registered titles, is not one which should be litigated only by a private party such as Bewkes. The Commonwealth's interests had not been represented in the litigation, and the Supreme Judicial Court had good reason to decline to entertain any challenge to the registration statute in this context if it perceived that such a challenge was presented.

Of course, as the foregoing argument demonstrates, good reason existed for the Supreme Judicial Court to conclude that no such challenge was made. The appellants now suggest that they "led the Supreme Judicial Court astray" by their own focus upon the statute erecting a one-year period of limitations for challenges to tax lien foreclosures. (J.S. at 2, n.5). The Supreme Judicial Court included in its opinion a discussion of the appellants' due process concerns relating to takings and foreclosures, but decided the case on adequate and independent state statutory grounds entirely separate from and unrelated to those concerns. (J.S.A. 10-11). The Supreme Judicial Court was not "led astray" at all. The court addressed the arguments which were presented properly, decided the case on the basis of the application of state law to the theories pleaded and facts proven, and wisely declined to engage itself in the consideration of issues which were not squarely in focus.

Conclusion

It is clear upon the record of prior proceedings that the appellants have never raised before the courts of Massachusetts the specific constitutional challenge which they now attempt to present. This case was tried and determined by the Land Court on the basis of the issues joined in the pleadings filed by the parties. The appellants' belated attempts to raise due process issues before the appellate courts of Massachusetts cannot serve as a basis for this Court's jurisdiction. The issues tried and raised on appeal were entirely distinct from the issue here presented, ant the Supreme Judicial Court refused, for good reason, to address any constitutional issue. Based upon the foregoing points and authorities, the appellee requests that this Court enter an order dismissing the instant appeal.

Respectfully submitted,

By his attorneys,

SHERBURNE, POWERS & NEEDHAM

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APPENDIX

Massachusetts Rules of Civil Procedure

RULE 24. INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the Commonwealth confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the Commonwealth confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Intervention by the Attorney General. When the constitutionality of an act of the legislature or the constitutionality or validity of an ordinance of any city or the by-law of any town is drawn in question in any action to which the Commonwealth or an officer, agency, or employee thereof is not a party, the party asserting the unconstitutionality of the act or the unconstitutionality or invalidity of the ordinance or by-law shall notify the attorney general within sufficient time to afford him an opportunity to intervene.

* * *

Massachusetts General Laws

c. 231A, § 8. Necessary parties; class actions

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or by-law or of a franchise, license, easement or other privilege granted by the commonwealth or a municipality thereof, the municipality, or the agency granting the privilege, as the case may be, shall be made a party and shall be entitled to be heard. If a question of constitutionality is involved in any proceeding under this chapter, the attorney general shall also be notified of the proceeding and be entitled to be heard.

Nothing set forth in this section shall bar the bringing of a class action for declaratory relief pursuant to the new rules of civil procedure.

Following entry of a final decree or order favorable to the petitioner or petitioners in a class suit, any member of said class thereafter aggrieved by any violation of said order or decree shall be entitled to compel compliance therewith by instituting contempt proceedings in said class suit.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss.

No. 106538

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, RUTH DIETRICH TUTTLE, DOROTHY STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, FLORENCE ANDERSON, ROBERT CLEAVES, JR., EDGAR D. GOULD, JR., AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART, MELBA W. NORVELL, AND LESTER B. WOODBURY

PLAINTIFFS

v.

ROBERT F. MOONEY

DEFENDANT

and

E. GARRETT BEWKES

DEFENDANT AND THIRD-PARTY PLAINTIFF

v.

WALTER BEINECKE, JR.

THIRD-PARTY DEFENDANT

SECOND AMENDED COMPLAINT

NATURE OF ACTION

1. By this action, the plaintiffs, Carol Tuttle Christian, Russell Tuttle, Ruth Dietrich Tuttle, Dorothy Stetson, George T. Mascott, Mary Seymour, Florence Anderson, Robert Cleaves, Jr., Edgar D. Gould, Jr., Agnes Conwell Quinlan, William J. Devine, Zelwyn A. Aarons, Benjamin N. Page, Virginia P. Hart, Melba W. Norvell, and Lester B. Woodbury

(collectively, "plaintiffs") seek a declaratory judgment that the defendant E. Garrett Bewkes ("Bewkes") holds certain property in a constructive trust in the right and for the benefit of the plaintiffs, and an order that Bewkes convey that property to the plaintiffs. In addition, plaintiffs seek to recover damages from the defendant Robert F. Mooney ("Mooney") for fraud and breach of fiduciary duty in examining title to the plaintiffs' property and in falsely reporting that title to the Land Court. The plaintiffs also seek review of the decree of the Land Court of December 9, 1981 registering title to certain property to the defendant Bewkes.

PARTIES, JURISDICTION AND VENUE

2. The plaintiff Carol Tuttle Christian ("Christian") is a resident of Shottermill, Haselmere, Surrey, England and is a co-owner of an undivided interest in and to a certain parcel of land on Nantucket Island, shown as Lots 355 through 370 on a plan entitled "Plan of House Lots for Sale by Winchester Veazie," Share 10, Smooth Hummocks, recorded in Proprietors' Plans, Book 1, Page 94 (the "Plan").

3. The Plaintiff Russell Tuttle ("Tuttle") is a resident of Landsdowne, Delaware County, Pennsylvania and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 355 through 370 on the Plan.

4. The plaintiff Ruth Dietrich Tuttle ("Dietrich Tuttle") is a resident of Concord, Middlesex County, Massachusets and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 355 through 370 on the Plan.

5. The plaintiff Dorothy Stetson ("Stetson") is a resident of Chestnut Hill, Norfolk County, Massachusetts and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

6. The plaintiff George T. Mascott ("Mascott") is a resident of St. Petersburg, Penelis County, Florida and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

7. The plaintiff Mary Seymour ("Seymour") is a resident of Ghent, Columbia County, New York, and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

8. The plaintiff Florence Anderson ("Anderson") is a resident of New York, New York County, New York and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

9. The plaintiff Robert Cleaves, Jr. ("Cleaves") is a resident of Chestnut Hill, Norfolk County, Massachusetts and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

10. The plaintiff Edgar D. Gould, Jr. ("Gould") is a resident of Fort Lauderdale, Broward County, Florida and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

11. The plaintiff Agnes Conwell Quinlan ("Quinlan") is a resident of Arlington, Virginia and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 355 through 370 on the Plan.

12. The plaintiff William J. Devine ("Devine") has an usual place of business at 11 Beacon Street, Boston, Suffolk County, Massachusetts and is a co-owner of an undivided interest in and to certain parcels of land shown as Lots 126 through 250; 272 through 273; 294 through 306; 309 through 324; and 355 through 370 on the Plan.

13. The plaintiff Zelwyn A. Aarons ("Aarons") is a resident of Carmel, Monterey County, California and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 126 through 250 on the Plan.

14. The plaintiff Benjamin N. Page ("Page") is a resident of Dover, New Hampshire and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 294 through 300 and 306 on the Plan.

15. The plaintiff Virginia P. Hart ("Hart") is a resident of Shawnee Mission, Kansas and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 294 through 300 and 306 on the Plan.

16. The plaintiff Melba W. Norvell ("Norvell") is a resident of Fallbrook, California and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 272; 273; 301 through 305; and 309 through 324 on the Plan.

17. The plaintiff Lester B. Woodbury ("Woodbury") is a resident of Springfield, Massachusetts and is a co-owner of an undivided interest in and to a certain parcel of land shown as Lots 272; 273; 301 through 305; and 309 through 324 on the Plan.

18. The defendant E. Garrett Bewkes, upon information and belief, has an usual place of business at 22 Federal Street, Nantucket, Nantucket County, Massachusetts.

19. The defendant Robert F. Mooney, upon information and belief, has an usual place of business at 22 Federal Street, Nantucket County, Massachusetts.

PLAINTIFFS' CLAIMS

I. Background

20. In 1874, one Winchester Veazie ("Veazie") acquired a certain parcel of land on Nantucket Island known as Share 10 of Smooth Hummocks, consisting of approximately 47.54 acres of land (the "locus"). Also in 1874, Veazie subdivided the locus into 380 lots and conveyed 361 of the 380 lots to D. Morton Fox ("Fox") and five single lots to five other individuals.

21. Thereafter, Fox conveyed all but one of his 361 lots to eight individuals, including lots 126 through 250 to Ellen (a/k/a "Ella") F. Gould, lots 270 through 324 to Andre Woodbury, and lots 355 through 270 to Russell H. Conwell. Ella F. Gould is the grandmother and/or predecessor in interest of plaintiffs Stetson, Mascott, Seymour, Anderson, Cleaves,

Gould, Devine, and Aarons. Andre Woodbury is the grandfather and/or predecessor in interest of the plaintiffs Norvell, Woodbury and Devine. Russell H. Conwell is the grandfather and/or predecessor in interest of the plaintiffs Quinlan, Russell Tuttle, Ruth Dietrich Tuttle and Devine.

22. Andre Woodbury conveyed lots 270, 271, 274 through 300 and lot 306 to Rufus A. Johnson. Rufus A. Johnson was the grandfather and/or predecessor in interest of the plaintiffs Page, Hart, and Devine.

23. Christian acquired her interest as an heir at law to her father, Melsom Tuttle, and her grandmother, Nima Conwell who was the daughter of Russell H. Conwell.

24. Tuttle acquired his interest as an heir at law to his father, Melsom Tuttle, and his grandmother Nima H. Conwell, who was the daughter of Russell H. Conwell.

25. Dietrich Tuttle acquired her interest as an heir at law to her husband, Melsom Tuttle, the son of Nima H. Conwell, who was the daughter of Russell H. Conwell.

26. Stetson acquired her interest as an heir at law of her mother, Josephine L. Cleaves (formerly Josephine L. Gould), who was the daughter of Amos D. Gould and Ella F. Gould.

27. Mascott acquired his interest as residual legatee of his wife Edith Mascott, who was the daughter of E. Florence Anderson (formerly E. Florence Gould) who was the daughter of Amos D. Gould and Ella F. Gould.

28. Seymour acquired her interest as an heir at law to her mother E. Florence Anderson (formerly E. Florence Gould), who was the daughter of Amos D. Gould and Ella F. Gould.

29. Anderson acquired her interest as an heir at law to her mother, E. Florence Anderson (formerly E. Florence Gould), who was the daughter of Amos D. Gould and Ella F. Gould.

30. Cleaves acquired his interest as heir at law to his mother, Josephine L. Cleaves (formerly Josephine L. Gould) who was the daughter of Amos D. Gould and Ella F. Gould.

31. Gould acquired his interest as an heir at law to his father, Edgar Gould, who was the son of Amos D. Gould and Ella F. Gould.

32. Quinlan acquired her interest as residual legatee under the will of her mother, Harriet B. Conwell, the son of Russell H. Conwell.

33. Devine acquired his interest by virtue of deeds from the other plaintiffs to themselves and Devine.

34. Aarons acquired his interest as residual legatee of his wife, Anna Aarons, who was the residual legatee of her mother, Mable M. Stallwagon, who was the daughter of Amos D. Gould and Ella F. Gould.

35. Page acquired his interest as an heir at law to his mother Louise Page, who was the daughter of Rufus A. and Ellen M. Johnson.

36. Hart acquired her interest as an heir at law to her mother, Louise Page, who was the daughter of Rufus A. and Ellen M. Johnson.

37. Norvell acquired her interest as a residual legatee of her father, Clarence G. Woodbury, who was the devisee under the will of Matilda F. Woodbury. Matilda F. Woodbury was the sole devisee under the will of her husband, Andre Woodbury.

38. Woodbury acquired his interest as an heir at law to his mother, Agnes H. Woodbury, who was a devisee under the will of Matilda F. Woodbury. Matilda F. Woodbury was the sole devisee under the will of her husband, Andre Woodbury.

COUNT I

39. Prior to 1963, the locus was not assessed for real estate tax purposes. In 1963, one of the tax assessors of the Town of Nantucket, John J. Gardner ("Gardner"), assessed the locus at a value of ten ($10.00) dollars, thereby imposing a tax in the amount of fifty-four ($.54) cents. The owner of the property was initially identified as "John Doe and others," but was subsequently changed by Gardner from "John Doe and others" to "Winchester Vezie [sic] of Nantucket." In fact, Veazie was a resident of Boston and deceased.

40. The assesment of the tax by Gardner to "Winchester Vezie [sic]" failed to comply with the requisites of G.L. c. 60, in that:

1. Veazie, or his heirs, owned but fourteen of the 380 lots assessed by Gardner;
2. No notice of the tax assessment was given by Gardner to the record owners of the 366 lots not owned by Veazie or his heirs;
3. The property assessed by Gardner was described as consisting of thirty acres, when in fact Veazie or his heirs were the record owners of but approximately 56,000 square feet of the locus, and the entire locus was approximately 46.54 acres.

41. The locus was taken by the Town of Nantucket on February 24, 1964 for non-payment of taxes, and, on March 27, 1964, the tax title was assigned to Gardner. The only notice of the assignment of the tax title was given to "Winchester Vezie" [sic].

42. On May 11, 1966, Gardner, through his attorney Roy E. Sanguinetti ("Sanguinetti") (who was also the Town Counsel and Town Moderator of the Town of Nantucket), filed a petition in the Land Court seeking to foreclose the equity of redemption in the locus (Land Court No. 43095). The only notice of the petition to foreclose the equity of redemption was given to Winchester Vezie [sic] and the petition stated that Veazie was the sole owner of the locus.

43. Gardner and Sanguinetti requested Mooney, a Nantucket attorney, to act as title examiner in connection with the petition to foreclose the equity of redemption and the Land Court granted the request. Mooney filed a title examination report with the Land Court on June 30, 1966, stating that Veazie, of Nantucket, was the record owner of the locus.

44. On or about April 4, 1967, the Land Court granted Gardner's petition to foreclose the equity of redemption.

45. Thereafter, on or about May 10, 1967, Gardner purported to convey the locus to Sanguinetti, as Trustee of Windswept Realty Trust, for less than $100.00.

46. On May 31, 1967, for consideration of $16,500, Sanguinetti purported to convey the locus to Walter Beinecke, Jr. ("Beinecke"), of New York, New York.

47. On October 16, 1968, Beinecke, through his attorney, Mooney, filed a registration petition in the Land Court (No. 35851) seeking to register title in the locus (the "Registration Case").

48. The registration petition filed by Beinecke and Mooney

(a) Stated that Beinecke was the owner in fee simple of the locus;
(b) Failed to disclose any other persons having an estate or interest in the locus; and
(c) Described the property to be registered as being the entire locus.

49. No notice of the Registration Case was given to the owners of the various lots of the locus.

50. On September 8, 1981, Bewkes was substituted as the petitioner in the Registration Case.

51. Bewkes paid only five thousand ($5,000.00) dollars for the locus and executed a promissory note and a mortgage to Beinecke. The note was contingent upon, *inter alia*, the completion of Land Court registration proceedings and the expiration of the appeal period and the execution of a confirmatory deed. In the event the registration proceedings were not completed within two years, Bewkes was obligated to reconvey the property to Beinecke and the note would become void and the mortgage discharged. Upon information and belief, the total purchase price paid and to be paid by Bewkes was less than ten (10%) percent of the fair value of the locus.

52. On December 9, 1981, the Court entered a decree registering title to the locus in Bewkes.

53. The assessment and imposition of a tax upon the locus by Gardner in 1963 not only failed to comply with the requisites of G.L. c. 60, but also was effected for the purpose and with the intent of causing the Town of Nantucket to acquire the locus and convey it to Gardner.

54. The assignment of the tax title by the Town to Gardner was a conflict-of-interest proscribed by G.L. c. 286A and was in violation of G.L. c. 60, in that no notice of the intended assignment was given to the owners of the locus, including the plaintiffs.

55. The subsequent petition to foreclose the equity of redemption in the locus (No. 43095) again failed to give proper and adequate notice to the owners of the locus and contained false statements that Winchester Vezie [sic] was the sole owner. Mooney, as the court appointed title examiner, knew or should have known by reviewing the records of the Nantucket Registry of Deeds that Veazie had conveyed 366 of the 380 lots of the locus in 1874 to various grantees and that there were numerous subsequent transfers of various parcels of the locus. Upon information and belief, Mooney conspired with Gardner and Sanguinetti to perpetrate a fraud upon the Land Court and upon the owners of the various parcels of the locus, and breached his fiduciary duty to the Land Court to report title with due care and without fraud.

56. The conduct of Gardner, Sanguinetti, and Mooney as aforesaid, rendered the taking and foreclosure ineffective and invalid as to the owners of the locus other than Veazie and his heirs. Upon information and belief, Beinecke, as the grantee from Sanguinetti, knew that the taking for non-payment of taxes, the assignment of the tax title, and the foreclosure of the equity of redemption by Sanguinetti, Gardner, and Mooney, was improper and that Sanguinetti, Gardner, and Mooney were engaged in fraudulent activity before the Land Court.

57. The registration petition instituted by Beinecke and Mooney contained a false statement that Beinecke was the sole

owner of the locus and failed to disclose the identity of other persons having an interest or estate in the locus. In truth and in fact, Beinecke was not the sole owner of the locus, as the records of the Nantucket Registry of Deeds readily revealed.

58. By virtue of the pleadings in the Registration Case, Bewkes knew, or is charged with knowledge of, *inter alia*, the fact that Beinecke did not own the locus in fee simple, that the taking by the town and subsequent assignment of tax title and foreclosure were improper; and that no notice of the proceedings was ever given to the true owners of the lots into which the locus had been subdivided. Despite his knowledge, Bewkes failed and refused to amend the registration petition or to otherwise advise the Land Court of the false statements contained therein.

59. On account of the conduct of Gardner, Sanguinetti, Mooney, Beinecke, and Bewkes, including the knowing and intentional fraud upon the Land Court, whether intentional or constructive, and the failure to give notice to the true owners of the lots of the locus, including the plaintiffs, Bewkes holds lots 126 through 250; 272; 273; 294 through 306; 309 through 324; and 355 through 370 of the locus in the right and for the benefit of plaintiffs, and as trustee of a constructive trust for the benefit of plaintiffs and the other owners of the lots wrongfully included in the registered title to Bewkes.

COUNT II

60. The plaintiffs repeat and reaver each and every allegation in paragraph 1-59 herein.

61. Mooney's title examination report filed with the Land Court was false and was made by him with knowledge of its falsity or with reckless disregard for its truth or falsity. In addition, the registration petition filed by Mooney on behalf of Beinecke was also false and was made by him with knowledge of its falsity or with reckless disregard for its truth or falsity, in that the petition falsely stated that Beinecke was the sole

owner of the locus, failed to disclose other interested parties, and described the property to be registered as the entire locus.

62. As a result of Mooney's fraudulent title examination report and registration petition, the plaintiffs have sustained damages in excess of $500,000.

63. By virtue of the foregoing, Mooney is liable to the plaintiffs in the sum of $500,000, together with interest and costs.

COUNT III

64. The plaintiffs repeat and reaver each and every allegation in paragraphs 1-59 herein.

65. Mooney, as a court-appointed title examiner, owed a fiduciary duty to the court and the plaintiffs to act in good faith, with reasonable care, and without fraud in reporting title.

66. Mooney breached his fiduciary duty to the plaintiffs and the court by falsely stating that Veazie was the record owner of the locus, and by intentionally failing to disclose the interests of the plaintiffs in the locus.

67. As a result of Mooney's breach of fiduciary duty, the plaintiffs have suffered damages in excess of $500,000.

68. By virtue of the foregoing, Mooney is liable to the plaintiffs in the sum of $500,000, together with interest and costs.

COUNT IV

69. The plaintiffs repeat and reaver each and every allegation in paragraphs 1-59 herein.

70. The conduct of Bewkes and Mooney and their predecessors, as aforesaid, rendered the decree of registration to Bewkes on December 9, 1981 invalid and void.

71. Pursuant to G.L. c. 185, § 45 this court should review the propriety of the registration decree and, upon such review, declare such decree to be void and without force and effect.

RELIEF REQUESTED

WHEREFORE, the plaintiffs demand judgment as follows:

1. That the Court, pursuant to G.L. c. 231, enter the following declaration: the defendant E. Garrett Bewkes holds title to Lots 126 through 250, 272, 273, 294 through 306, 309 through 324, and 355 through 370 of a parcel of land shown on a plan entitled "Plan of House Lots for Sale by Winchester Vezie, Share 10, Smooth Hummocks," recorded in Proprietors' Plans, Book, Page 94, in a constructive trust for the plaintiffs.

2. That the Court order the defendant E. Garrett Bewkes to execute and deliver forthwith to the plaintiffs Dorothy Stetson, George T. Mascott, Mary Seymour, Florence Anderson, Robert Cleaves, Edgar D. Gould, Jr., William J. Devine, and Zelwyn A. Aarons, as tenants-in-common, a deed to Lots 126 through 250 of Share 10, Smooth Hummocks.

3. That the court order the defendant E. Garrett Bewkes to execute and deliver forthwith to the plaintiffs Carol Tuttle Christian, Russell Tuttle, Ruth Dietrich Tuttle, Agnes Conwell Quinlan, and William J. Devine, as tenants-in-common, a deed to Lots 355 through 370, Share 10, Smooth Hummocks.

4. That the Court order the defendant E. Garrett Bewkes to execute and deliver forthwith to the plaintiffs Benjamin N. Page, Virginia P. Hart, and William J. Devine, as tenants-in-common, a deed to Lots 294 through 300 and 306 of Share 10, Smooth Hummocks.

5. That the Court order the plaintiff E. Garrett Bewkes to execute and deliver forthwith to the plaintiffs Melba W. Norvell, Lester B. Woodbury, and William J. Devine, as tenants-in-common, a deed to Lots 272; 273; 301 through 305; and 309 through 324 of Share 10, Smooth Hummocks.

6. That the defendant Robert F. Mooney be ordered to pay forthwith to the plaintiffs the sum of $500,000, together with interest and costs.

7. That the court review the registration decree of December 9, 1981 and enter a declaration that such decree is void and without force and effect.

8. That the plaintiffs be awarded their costs and expenses, including attorneys' fees, incurred in maintaining this complaint.

9. That the Court grant such other and further relief as it deems meet and just.

By their attorneys,

CARL K. KING
PETER S. BROOKS
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One Federal Street
Boston, MA 02110

DATED: November 23, 1982

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, SS.

No. 106538

CAROL TUTTLE CHRISTIAN, RUSSELL TUTTLE, RUTH DIETRICH TUTTLE, DOROTHY STETSON, GEORGE T. MASCOTT, MARY SEYMOUR, FLORENCE ANDERSON, ROBERT CLEAVES, JR., EDGAR D. GOULD, JR., AGNES CONWELL QUINLAN, WILLIAM J. DEVINE, ZELWYN A. AARONS, BENJAMIN N. PAGE, VIRGINIA P. HART, MELBA W. NORVELL, AND LESTER B. WOODBURY

PLAINTIFFS

v.

ROBERT F. MOONEY

DEFENDANT

and

E. GARRETT BEWKES

DEFENDANT AND THIRD-PARTY PLAINTIFF

v.

WALTER BEINECKE, JR.

THIRD-PARTY DEFENDANT

MOTION TO JOIN PARTY

Defendant and third party plaintiff, E. Garret Bewkes, moves the Court to join the Commonwealth of Massachusetts as a necessary party in the instant action and states as reasons therefor:

i) that complete relief cannot be afforded the moving party unless the Commonwealth is a party as moving party will have rights against the Commonwealth under the provi-

sions of c. 185 §99-109 (the assurance fund) if plaintiff's prayers as set forth in the Second Amended Complaint are allowed; and further,

ii) that in accordance with the provisions of c. 231A, §8 all persons shall be made parties to an action for declaratory relief who have any interest which would be affected by the declaration. The instant proceeding involves a privilege granted by the Commonwealth (i.e. decree of registration) and without the Commonwealth being a party to this proceeding plaintiffs' requested relief as set forth in the Second Amended Complaint cannot be granted.

E. Garrett Bewkes

By His Attorney

s/ THEODORE L. TILLOTSON

THEODORE L. TILLOTSON
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December 12, 1984

EXCERPTS: DOCKET ENTRIES

106538 - EQUITY

AGNES CONWELL QUINLAN, ET AL *v.* E. GARRETT BEWKES, JR.

Dec. 12, 1984	Motion to Join Party, filed
Dec. 12, 1984	Motion to Extend Time for Discovery, filed
Dec. 14, 1984	Defendant Robert F. Mooney's Motion to Further Amend his Answer, filed
Dec. 14, 1984	Affidavit of Notice of Motion, filed
Dec. 14, 1984	Notice of Taking Deposition, filed
Dec. 21, 1984	Motion to Amend Defendant Robert F. Mooney's Answer filed 11/2/84 — Motion Waived (Keady, J.)
Dec. 21, 1984	Defendants' Motion to Amend Answer to Plaintiff's Second Amended Complaint, filed 11/1/84 — Motion Allowed
Dec. 21, 1984	Defendant Robert F. Mooney's Motion to Further Amend his Answer filed 12/14/84 — Motion Allowed
Dec. 21, 1984	Defendants' Motion to Extend Time for Discovery, filed 12/12/84 — Motion Allowed as Modified to January 18, 1985
Dec. 26, 1984	Commonwealth's Brief in Support of Motion to Join Commonwealth, filed
Dec. 27, 1984	Defendants' Memorandum in Support of Motion to Join the Commonwealth as party, filed
Dec. 28, 1984	Plaintiffs' Memorandum in Opposition to Motion to Join Party, filed
Jan. 2, 1985	Supplementary Order Entered (By the Court, Keady, J.)
Jan. 10, 1985	Motion to Join Party, filed 12/12/84 — Motion denied (Keady, J.)
Jan. 10, 1985	Memorandum of Decision on Defendants' Motion to Join a Party, entered

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

SUFFOLK, ss.

No. 106538

CAROL TUTTLE CHRISTIAN, ET AL.

v.

E. GARRETT BEWKES, ET AL.

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO JOIN A PARTY

Defendant Bewkes has moved to join the Commonwealth as a necessary party, by a motion dated December 12, 1984. For the reasons outlined below, this motion is denied.

Defendant contends that he cannot be afforded complete relief unless the Commonwealth is joined, in that he will have rights against the Assurance Fund, pursuant to G.L. c. 185 § 101, should plaintiffs prevail. This contention is grounded on Mass. R. Civ. P. 19(a)(1).

Defendant's claim must fail for two reasons. First, the Commonwealth's absence from this proceeding will not prevent the court from "adjudicat[ing] finally all issues between current parties." J. W. Smith and H. B. Zobel, Rules Practice § 19.3, at 32 (1975). Any claim against the Assurance Fund can only be brought by a "person who. . .sustains loss." General Laws chapter 185 § 101. No party to this proceeding will have sustained a loss until a determination has actually been made here. Indeed, the statute requires that a party exhaust all other remedies before instituting an action against the Assurance Fund. *Id.* Because the statutory scheme set out in c. 185 § 101 contemplates a separate, subsequent action against the Assur-

ance fund, this case may proceed "in equity and good conscience" without the Commonwealth's presence. Rule 19(b). The Commonwealth is thus not indispensable to relief, under Rule 19.

Secondly, the Land Court does not have jurisdiction over a claim against the Assurance Fund. The Land Court has jurisdiction only over "cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved, except actions for specific performance of contracts." Chapter 185 § 1(k). A claim against the Assurance Fund does not fall within this court's equity jurisdiction. In fact, chapter 185 § 101 specifically provides that a person with such a claim "may recover *in contract* in the *Superior Court.*" (emphasis added).

Because the Commonwealth is not an indispensable party under Rule 19(b), this action can proceed without it. And since this court has no jurisdiction over any claim against the Commonwealth, it cannot be joined even if it is a necessary party under Rule 19(a)(2). An action may proceed if there is no jurisdiction over a necessary party, so long as that party is not indispensable. *Franks* v. *Markson*, 337 Mass. 278, 283-284 (1958). I therefore need not reach the question of whether the Commonwealth is a necessary party under Rule 19(a)(2).

Defendant also argues that G.L. c. 231A § 8 mandates joinder of the Commonwealth in this action for declaratory relief. That section provides, in pertinent part, that "[i]n any proceeding which involves the validity of a...privilege granted by the Commonwealth..., the municipality, or the agency granting the privilege...shall be made a party and shall be entitled to be heard." Defendant contends that the Certificate of Title issued by the Land Court is a "privilege" within the meaning of c. 231A § 8.

Once again, I need not reach this issue: regardless of its outcome, joinder of the Commonwealth would be a meaningless exercise because the Land Court has no jurisdiction over the

claim against the Assurance Fund. Since the Commonwealth's absence will not prejudice any current parties or the Commonwealth itself, the case may proceed without it.

ORDER

It is therefore *Ordered* that defendant's motion to join a party be denied.

s/ GEORGE C. KEADY, JR.
GEORGE C. KEADY, JR.
Justice of the Superior Court

DATED: January 10, 1985

EXCERPT FROM APPELLANTS' BRIEF TO SUPREME JUDICIAL COURT

B. *G.L. c. 60, §69A Does Not Bar Plaintiffs' Rights in the Locus as the Assessment, Tax Taking and Tax Foreclosure Action Were Fatally Flawed and Constitutionally Defective.*

1. *Tax taking procedures must be strictly followed.*

The Land Court deprived plaintiffs of their interests in the Locus despite its conclusion that the proceedings upon which the deprivation were based were nullities and of no legal effect as to plaintiffs (I:314, 331).

As the undisputed record required, the Land Court found the original assessment to be invalid pursuant to G.L. c. 59, § 11 (I:314). The record owners were never given notice of the assessment or of the tax lien foreclosure. The notices named only Mr. Veazie, Mr. Easton and their wives (V:1995), who retained record title to only a small portion of the Locus. Assessment must be to the record owner and notice must be directed to him. Without this, interests cannot be affected by tax lien or foreclosure proceedings. This is mandated by state law and constitutional protections of property.

As stated in *Wood* v. *Wilson*, 256 Mass. 340, 342 (1926):

> Brown, to whom the taxes were assessed, was not the owner of the whole of the land assessed, which comprised lots A, C and D. He did own a specific part. *The entire tract could not be assessed to one who owned but a specific portion of it.* Lancy v. Boston, 186 Mass. 128. Because of this assessment to Brown as the owner of the entire tract, the tax sale was invalid.

(Emphasis added). Relying upon *Lancaster* v. *Foley*, 15 Mass. App. Ct. 967 (rescript), *further appellate review denied*, 389 Mass. 1103 (1983), the Land Court erroneously held that the Decree in the Tax Foreclosure Action created a barrier to

plaintiffs' recovery of the Locus, pursuant to G.L. c. 60, § 69A (I:332).

There must be strict compliance with the statute for foreclosure decrees to operate as a bar. *Charland* v. *Trustees of the Home for Aged Women*, 204 Mass. 563, 567 (1910), stated: "The power to sell property for non-payment of taxes is *strictissimi juris*, and a *failure to comply with the statutory requirements, even in minute particulars, is fatal*" (Emphasis added in part). Where statutory requirements in the assessment and the tax taking are not met, those proceedings, and all subsequent proceedings based upon them, are invalid. Where the assessment was to the wrong party and notice was directed only to him, the invalidity is apparent and fatal.

The Land Court itself has so applied *Wood* and *Charland* in a closely analogous situation. In *Land Builders, Ltd.* v. *Brooks*, 2 Mass. Supp. 736 (Land Ct. 1981) (Misc. No. 98749) (copy attached hereto as Attachment E) title to property apparently had been conveyed twice and the title examination in a tax lien foreclosure action had failed to disclose the prior conveyance. Thus, "*no notice* was ever given to the [record owners] of the tax proceedings and they had *no opportunity* to contest the same." *Id.* at 740 (Emphasis added). The rightful owners filed suit some fifty years after the purported tax takings and forty-two years after the tax lien foreclosure decree. The Land Court, following *Wood*, *supra* at 342, *Holcombe* v. *Hopkins*, 314 Mass. 113, 115 (1943), and *Streeter* v. *Worcester*, 336 Mass. 469, 470-471 (1957), held for plaintiffs. 2 Mass. Supp. at 740-741. The Land Court recognized that there must be strict compliance with the law in tax takings, including notice requirements. There is no reason the Land Court should not have applied the principles of *Land Builders* here.

In the light of such cases as *Wood*, *Charland* and *Land Builders*, plaintiffs are entitled to the Locus. The failure of the Town to assess the true owners, the erroneous assessment of

other parties and the total lack of notice of any sort of the tax taking, the assignment to Mr. Gardner of the Tax Foreclosure Action render the taking and the foreclosure decree a nullity. This, in turn, is grounds for revocation of the decree of registration, G.L. c. 185, § 45, and/or the imposition of a constructive trust upon the Locus.

2. *The absence of constitutionally required notice deprived plaintiffs of due process of law.*

Even if the purported taking of plaintiffs' property were not in violation of Massachusetts statutes and controlling judicial decisions, it is plain that the assessment, taking and the Tax Foreclosure Action deprived plaintiffs of property without the due process of law guaranteed by the United States Constitution. Notice was not even purported to be given to plaintiffs; it was to Mr. Veazie, not to them or the record owner. Such notice could not possibly have been "reasonably calculated to reach the persons entitled to it" as the United States Constitution requires. Even if given to the right persons, notice published in the *Nantucket Inquirer and Mirror* in January and February (V:1858) to persons known not to be Nantucket residents (V:1871) does not meet the constitutional requirement of notice by the best means reasonably available.

The jurisprudence makes it plain that the purported notice was constitutionally insufficient. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), states the basic requirements for adequate notice. *Mullane* concerned the pooling of trust funds. The only notice, published in a newspaper, listed the trusts, not the beneficiaries. 339 U.S. at 310. *Mullane* stated that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315. For a notice which was "in small type inserted in the back pages of a newspaper. . . [t]he chance of actual notice

is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." The Court concluded: "In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." *Id.*

Mennonite Board of Missions v. *Adams*, 462 U.S. 791 (1983), applies *Mullane* to tax takings. *Mennonite* held that a tax taking of land without notice to a mortgagee violated the mortgagee's due process rights by extinguishing the mortgage interest without notice. *Mennonite* mandated that where an interest was identified in a record, "constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*." 462 U.S. at 798 (Footnote omitted).

The notice here, by publication to an absentee record holder of a fractional interest and his grantor, both long since dead, resembles that found inadequate in *Mullane*. The notice was a "mere gesture", plainly not designed to inform individuals having current record interests or their heirs. Moreover, the notice given here was conclusively deficient, given *Mennonite's* firm requirement of notice by mail to the last known address or by some other method equally likely to provide actual notice.

Although not employing the language of constitutional due process, this Court previously has recognized that the exercise of "reasonable diligence" to ascertain record owners and to give them notice is a necessary element of tax assessment proceedings in this Commonwealth. In *Hardy* v. *Jaeckle*, 371 Mass. 573, 580 (1976), this Court held that in determining the record owners of certain pasture lands on Nantucket, assessors must "exercise reasonable diligence" to identify the record owners "by resort to the records in the appropriate registry of

deeds and registry of probate". Under "the particular circumstances" presented in *Hardy*, this Court held that no more was required. But even the relaxed standard of *Hardy* was not met here. If it had been met, the Registry would have been searched properly, the record interests of plaintiffs' predecessors in interest located, the lots which they owned assessed to them and notice of any taking given to them.

The requirements of federal due process thus parallel the existing law of the Commonwealth regarding the validity of tax takings. Improper assessments, lack of notice and failure to comply with the provisions of the tax taking statutes *"strictissimi juris"* all render a tax foreclosure invalid and a nullity. The reason for this not only is compliance with the statutory scheme, but also to ensure that there is sufficient protection of the constitutional rights of property owners in any action involving a taking of that property.

The inapplicability of G.L. c. 60, § 69A in circumstances such as this action recently was reconfirmed in *Sharon* v. *Kafka*, 18 Mass. App. Ct. 541 (1984). In *Sharon*, the Appeals Court found that an owner's incapacity was a basis for vacating the decrees only within one year of the entry of the decree, under G.L. c. 60, § 69A, but went on to state:

> There may be, however, circumstances which justify vacating the decrees.... The judge...may in his discretion permit the petitioners to file amended petitions if they can...show that they come...within the rule of other decisions involving the denial of due process of law in analogous circumstances.... *If there was a denial of due process, the stricture of §69A would not apply.*

18 Mass. App. Ct. at 543-44 (Citations omitted, emphasis added). Similarly here, the Land Court found the assessment to be invalid because it was directed to the wrong parties. This finding is the statutory equivalent of a finding of deprivation of due process because of lack of notice.

Mennonite, of course, also raises questions regarding the constitutional validity of the procedures approved in *Hardy* v. *Jaeckle*. In *United States* v. *125.2 Acres of Land*, 732 F.2d 239 (1st Cir. 1984), for example, notice by publication and posting was found inadequate, where more precise notice was possible. The decision noted that an address could be obtained from the telephone book, and concluded: "Due process requires more." 732 F.2d at 242. Under *125.2 Acres*, the town is required to look to all materials reasonably available to attempt to locate the record owners and provide them with actual notice. In contrast, *Hardy* held that a town did not have to look for information regarding the ownership of land outside the appropriate public records. 371 Mass. at 580. In the light of *Mennonite* and *125.2 Acres*, it would appear that the narrow restrictions on source material for locating owners of record set forth in *Hardy* no longer are applicable.

The continued vitality of *Hardy's* restriction of search efforts to public records need not be reached in this case.[4] The Land Court's decision is premised exclusively on the applicability of the bar of G.L. c. 60, § 69A. As *Sharon* v. *Kafka*, *supra*, stated, where there is a denial of constitutional rights, the bar of § 69A cannot operate to deprive a person of his interest in property. *See also*, *Bartevian* v. *Cullen*, 369 Mass. 819 (1976); *Johnson* v. *McMahon*, 344 Mass. 348, 356 (1962); *McHale* v. *Treworgy*, 325 Mass. 381 (1956), which hold that titles taken by invalid takings are not validated by provisions similar to § 69A. Because the notice here did not comply with the constitutional requirement of reasonable effort, even under the relaxed standards of *Hardy* v. *Jaeckle*, it was constitutionally defective and the bar of § 69A does not apply.

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[4] Nor need the Court address the question of the propriety of the Land Court's reliance on, or the continued vitality of, *Guaranty Mortgage Corp.* v. *Burlington*, 385 Mass. 411 (1982). Although the language of *Guaranty Mortgage* seems dubious under *Mennonite* and *125.2 Acres*, that case dealt only with "low value" takings subject to a process not at issue in this case. *See Hilde* v. *Dixon*, 16 Mass. App. 981 (rescript), further appellate review denied, 390 Mass. 1104 (1983).

Decisions of the United States Supreme Court are to the same effect. The inadequacy of the notice provided has the constitutionally necessary effect of voiding all the proceedings in the Land Court relating to the Locus from the time of the initial tax assessment up to the initiation of the present proceeding. It is well-settled that "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer* v. *Chemical Const. Corp.*, 456 U.S. 461, 482 (1982) (citing *McDonald* v. *Mabee*, 243 U.S. 90 (1917); *Haddock* v. *Haddock*, 201 U.S. 562 (1906)). This principle has been applied even where a claimant may have had actual notice that proceedings were under way, so long as the "reasonable notice" required by the Constitution was not provided. *City of New York* v. *New York, N.H. & H. R. Co.*, 344 U.S. 293, 297 (1953).

This principle was recognized and applied in *125.2 Acres of Land*, *supra*, where notice by publication and posting of an eminent domain proceeding was held inadequate. It was held that the judgment in the 1953 compensation proceeding cut off no rights that the owner or the owner's heirs might have asserted in that proceeding. It should be noted that the decision did not permit the executrix of the estate of the record owner to contest the title of the United States. However, this limitation was based on the peculiarities of the federal eminent domain power. The United States Declaration of Taking Act, 40 U.S.C. § 258a-e, does not require notice in order to vest title in the United States, nor does the Due Process Clause of the Fifth Amendment, which requires only that takings for public purposes not be accomplished without just compensation. Hence, the validity of the taking itself in *125.2 Acres of Land* was not dependent upon reasonable notice to the owners and others having an interest in the property. Proper notice of the 1953 compensation proceeding was required by due process, but the title of the United States was not at issue there.

The limitation on the rights of owners to reclaim property taken by the United States through eminent domain, recognized in *125.2 Acres of Land*, clearly is inapplicable here. As this Court noted recently in *Lynnfield* v. *Owners Unknown*, 397 Mass. 470, 473-474 (1986), the only public or town interest in a tax "taking" is the interest in the recovery of back taxes. Unlike an eminent domain proceeding, there is no public interest in providing an expeditious procedure for the state to acquire title. And, far from immediately vesting title to real estate in the Town, as does the Declaration of Taking Act, Massachusetts tax taking statutes require elaborate proceedings, including termination of rights of redemption, for the adjudication of title to real estate to a town for nonpayment of taxes. It is notice precisely of these proceedings, proceedings which could (and in this case almost certainly would) have resulted in retention of title by the rightful owners, that was lacking here. Because of that failure, all proceedings leading toward adjudication of title to the Locus to the Town were void and plaintiffs are entitled to reclaim the Locus. G.L. c. 60, § 69A may not constitutionally impose a bar to such an action.

The deprivation of plaintiffs' property without due process of law violated the Declaration of Rights, art. 12, of the Massachusetts Constitution. This Court long has recognized that Article 12 contains the same prohibition against deprivations of life, liberty and property without due process of law as the Fourteenth Amendment because "the words 'the law of the land' in art. 12 which were taken from Magna Charta embrace all that is comprehended in the words 'due process of law' in the Fourteenth Amendment." *Pugliese* v. *Commonwealth*, 335 Mass. 471, 475 (1957).

This Court also has recognized that Article 12 "contains safeguards 'at least as strong as those of the Fourteenth Amendment to the United States Constitution.' " *Pugliese* v. *Commonwealth*, *supra*, 335 Mass. at 475, citing *Lowell Gas*

Co. v. *Department of Public Utilities*, 324 Mass. 80, 87, *cert. denied*, 338 U.S. 825 (1949); *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 320 (1933); *Pizer* v. *Hunt*, 253 Mass. 321, 332 (1925). This Court has reaffirmed the principle "that in some situations the State Constitution may afford more protection against deprivation of property without due process than that guaranteed by the Fourteenth Amendment." *McClory* v. *Merkert*, 383 Mass. 883, 884 n.2 (1981) (rescript). This Court also has recognized it "may fashion its own concepts of due process of law under the Constitution of the Commonwealth and apply them within the permissible limits of the Constitution of the United States." *Phillips* v. *Youth Development Program, Inc.*, 390 Mass. 652, 658-659 (1983). *See also*, *Moe* v. *Secretary of Administration and Finance*, 382 Mass. 629, 649 (1981).

In view of the established interpretation of Article 12 as providing at least as much protection to property owners as Amendment XIV of the United States Constitution, the absence of notice to plaintiffs violates the Declaration of Rights, art. 12. This Court clearly must follow the principles of due process recognized by the United States Supreme Court in *Mullane* and *Mennonite* in construing the sufficiency of notice to satisfy Article 12. Accordingly, the Land Court's decision must be reversed because of the failure to provide the notice required by the Declaration of Rights, art. 12.

EXCERPTS OF APPELLANT'S REPLY BRIEF TO SUPREME JUDICIAL COURT

B. *Because of the Fraud and Denial of Due Process G.L. c. 60, §69A Is Inapplicable and the Decree of Registration Was Wrongfully Procured.*

1. *G.L. c. 60, §69A Is Inapplicable.*

The defects in the assessment, tax taking and title examination, and the absence of notice denied plaintiffs due process of law. "If there was a denial of due process, the stricture of § 69A would not apply." *Sharon* v. *Kafka*, 18 Mass. App. Ct. 541, 544 (1984).[4] This principle is so well-settled that defendants do not contest it directly. They concentrate instead on irrelevant statutory provisions and inapposite prior decisions.

Defendants' contention that the defects in assessment tax taking and tax lien foreclosure were neither "substantial" nor "misleading," Bewkes Brief ("B.B.") at 57-61, overlooks the finding of the Land Court to the contrary, and their failure to carry their burden of proof on this issue. *Bartevian* v. *Cullen*, 369 Mass. 819, 822-23 (1976). Reference to other types of assessments and takings are irrelevant because in any such assessment record owners would have been entitled to notice. The cases cited at pages 26-29 of Plaintiff's Brief ("D.B.") mandate strict compliance with the statutory provisions.

Defendant Bewkes cites G.L. c. 60, § 37 in arguing against the rule that errors in tax takings are to be construed "strictissimi juris." (B.B. at 57-58). This is misplaced. As noted by this Court in *Lenox* v. *Olgesby*, 311 Mass. 269, 277 (1942) "[t]his provision has been a part of the tax law since at least 1915." Such a provision was applicable in *Land Builders, Ltd.* v. *Brooks*, 2 Mass. Supp. 736 (Land Ct. 1981) (D.B. Attachment E), which voided a tax taking challenged forty two years after a decree of foreclosure, as well as in *Wood* v. *Wilson*, 256

[4] Had this section not been improperly applied, as the Land Court said, the "decision as to Bewkes and in turn Beinecke might be different."

Mass. 340, 342 (1926) ("a sale of a person's property for non-payment of taxes must be conducted in strict compliance with the law and every requisite of the statute must be complied with.")

The cases cited by defendant Bewkes are inapposite because in each one the Court found notice. Here there was no notice. *Streeter* v. *Worcester*, 336 Mass. 469, 471 (1957), (failure to assess the actual owner renders the tax and the sale void). *Streeter* denied recovery because plaintiff had actual notice. *Gaunt* v. *Arzoomanian*, 313 Mass. 38, 40 (1943), (notice had not been sent to the actual owner, but the effect "was not involved in this case" where the plaintiff succeeded to one who had actual notice). *Springfield* v. *Schaffer*, 12 Mass. App. Ct. 277 (1981), (assessment to the dissolved record owner corporation, so that assessment to him was to the actual owner).[5]

The Land Court found the assessment was invalid under G.L. c. 59, § 11. There was no notice. Based on this finding, the opinion is internally inconsistent. Subsequent proceedings have no foundation at all and constituted a nullity. G.L. c. 60, § 69A is not a bar.

2. *Plaintiffs Have a Property Interest Which Gives Them Standing To Challenge Lack of Due Process in the Underlying Proceedings.*

The plaintiffs here seek to protect property interests that they hold either by deed or succession. Such property interests are within the core of those protected by the due process clause.

Fors v. *Lehrman*, 741 F.2d 1130 (9th Cir. 1984), relied upon by defendants to challenge plaintiffs' standing, in fact demonstrates that they have standing. In *Fors*, non-dependent parents, who had not been qualified as executors or adminis-

[5] The contention that Mass. R. Civ. P. 24(d) is applicable misconstrues plaintiffs' position. Plaintiffs do not contend that there was an unconstitutional statute. They contend that the failure to follow applicable statutes resulted in a denial of due process.

trators of their son's estate, were excluded from challenging a change of status determination in the military (from MIA to KIA) because they had no property interest in the determination at issue. *Fors* nevertheless makes clear, citing earlier cases, that *dependent* parents would have been qualified to challenge the change of status decision because they would have had a property interest. 741 F.2d at 1133-34. That is the analog to this case. Plaintiffs are pursuing their own interests in the Locus which they hold by virtue of their predecessors in title. They may, indeed must, to perfect their own title, pursue all legal issues relevant to the validity of the predecessors' holdings. If defending one's predecessor's title were the pursuit of the rights of third persons and therefore barred by lack of standing, as defendants contend, most property interests would become literally indefensible.

Defendants, similarly, have completely misunderstood the applicability of *Allen* v. *Board of Assessors of Granby*, 387 Mass. 117 (1982). The requirement in *Allen*, that plaintiffs have a property interest at stake as recognized by state law, is noncontroversial. And here there is no question that the interests that plaintiffs hold are property interests for purposes of Massachusetts law.

In *Allen* the supposed "property" interest that was asserted was a claim to discretionary tax abatements. Under the applicable statutes assessors could in their "judgment" grant or deny such abatements for a given year. The court held that this possibility of abatement was a mere expectancy, not a property interest. 387 Mass. at 121.

The rights in real property that are being claimed by the plaintiffs in this case are the rights to title and possession of the property. As the opinion of this court in *Lynnfield* makes clear, no Massachusetts official is given the discretion to grant or deny real property claims depending upon their "subjective judgment."

Defendants' challenge to the standing of executors and administrators during the pendency of the action is similarly misplaced.[6] Defendants never previously objected to these substitutions even at the hearing on the post-trial motions. Supplemental Appendix ("S.A.") 324. They also ignore the provisions of Mass. R. Civ. P. 17 and 25 which permit such executors to be substituted. They ignore that Rule 17(a) permits proper parties to be substituted following this Court's decision. They also overlook that G.L. c. 60, § 76A(a) gives the owner of any portion of a subdivision the right to redeem the entire subdivision on behalf of all the other owners, and the power of this court to fashion an appropriate remedy in its mandate. The constructive trustees will take for the benefit of the rightful owners subject to the usual demands for accounting.

[6] While the defendants claim that constitutional interests are "personal", they cite no authority for the proposition, nor could they, that constitutional rights lapse at the death of the person whose rights were directly violated. Due process claims pursued by or on behalf of successors in title are ubiquitous. For example, one of the leading cases directly applicable to this situation, *United States* v. *125.2 Acres of Land*, 732 F.2d 239 (1st Cir. 1984), is pursued by an executrix for the benefit of heirs. 732 F.2d at 241. Indeed, the first tax taking due process case ever decided by the United States bears the revealing caption, *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. 272 (1855).